78-1431

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978 No.

JOHNSON OIL COMPANY, INC.	:	PETITION FOR WRIT OF CERTIORARI TO THE
Petitioner	:	UNITED STATES COURT OF APPEALS FOR THE
vs.	:	TENTH CIRCUIT
MOUNTAIN FUEL SUPPLY COMPANY,	:	
Respondent.	:	

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vs.	:	
MOUNTAIN FUEL SUPPLY COMPANY,	:	
Respondent.	:	

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Johnson Oil Company, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on November 22, 1978.

OPINIONS BELOW

The November 22, 1978 opinion of the Court of Appeals of the Tenth Circuit, whose judgment is herein sought to be reviewed, is reported at 586 F.2d 1375 and is reprinted in a separate appendix to this petition, pp. 29-65. The prior opinions of the United States District Court for the District of Utah, Northern Division, also reprinted in the appendix at pp. 66-97, were not reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 22nd, 1978. On December 20, 1978 the Petitions for Rehearing filed by the appellant and appellee were denied. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The question presented by this Petition is whether on appeal a claim for punitive damages, arising in conjunction with a common law tort claim and a common law contract claim as well as a claim of breach of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. § 751, gives the Tenth Circuit Court of Appeals jurisdiction to decide the punitive damages claim, or whether, by reason of some of the other claims of the appeal being founded in EPAA and other Federal price freeze legislation, the entire appeal, including the punitive damages claim, must be heard by the Temporary Emergency Court of Appeals (TECA) and, if so, whether the Tenth Circuit can transfer jurisdiction of the appeal or any part thereof to TECA.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Emergency Stabilization Act of 1970 (ESA) 12 U.S.C. § 1904, Note. Section 211(b)(2) of that Act provides:

> Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder.

Section 754(a)(1) of EPAA incorporates by reference §§ 205 - 211 of ESA as its enforcement provisions.

STATEMENT OF THE CASE

On June 28, 1974 respondent herein, Mountain Fuel Supply Company, brought a complaint against petitioner and Reland Johnson, petitioner's president and principal stockholder. The complaint was

filed in the state district court of Davis County, Utah. Respondent claimed in that action that petitioner owed monies for deliveries of oil made between November 1973 and April 1974. Petitioner filed an answer and counterclaim and petitioned for removal to the Federal Court on January 6, 1975, which put the case before the United States District Court for the District of Utah, Northern Division.

Petitioner Johnson Oil made essentially five claims in its counterclaim, namely: (1) respondent had tortiously interferred with the business relationship between petitioner and Allied Chemical Company; (2) respondent had terminated its supply of crude oil to petitioner in breach of the terms of the written contract between the parties and also in violation of the freeze order requirements of EPAA; (3) respondent billed petitioner

during the period of November 1973 to April 1974 at improper prices for the crude oil delivered, based on an inflated "posted" price as well as based on "new" and "released" oil prices, as those terms are defined in EPAA regulations, whereas petitioner should have been billed only at "old" oil prices, as defined in the Act; (4) petitioner claimed entitlement to civil penalties, treble damages, and attorney's fees as specified in ESA because of the respondent's violations of EPAA and its regulations; (5) petitioner claimed entitlement to punitive damages because of respondent's malicious and willful conduct in interfering with petitioner's business relationship with Allied and in terminating the oil supply relationship between the parties.

On May 28, 1976, the District Court ruled that respondent Mountain Fuel was

entitled to charge petitioner at "old" and "released" oil rates but not on the basis of "new" oil. It further found that the price set by respondent as the "posted" price was 44 cents per barrel too high. Based on that ruling, petitioner stipulated to the payment to respondent of $19,629.50, which essentially was payment for the "released" oil price differential not previously paid by petitioner for quantities of oil delivered during the time in question. The parties also stipulated that the issues of treble damages, civil penalties, and attorney's fees were reserved for determination after the trial.

The case went before the jury on June 21, 1976 on three issues: (1) intentional interference with a business relationship; (2) breach of contract and violation of EPAA freeze regulations for non-delivery

of oil; (3) punitive damages. At the conclusion of the trial the jury awarded $65,000 as compensatory damages and $110,000 as punitive damages, without specifying whether either the compensatory or the punitive damages were for the tort claim or the breach of the supply relationship.

Subsequent to the jury trial the District Court ruled that petitioner was not entitled to treble damages, attorney's fees, and civil penalties. The Court further ruled that the award of $110,000 punitive damages was to be deleted from the jury award, leaving only the compensatory damages in the amount of $65,000. All of the rulings of the Court, including the May 28, 1976 ruling, the jury verdict, and the post jury rulings, were combined in an order and judgment of the District Court dated May 2, 1977.

Both petitioner and respondent filed appeals with the United States Court of Appeals for the Tenth Circuit. The principal thrust of petitioner's appeal was that the jury award of punitive damages should not have been deleted. Petitioner also argued that it was entitled to attorney's fees, trebel damages on overcharges and civil penalties pursuant to ESA, and that the "posted" price as set by the District Court was still three cents too high.

The respondent's appeal to the Tenth Circuit was based in large part on the May 28, 1976 ruling of the Court as to the definition of "posted" price and as to the elimination of "new" oil being charged to petitioner. Respondent also objected to certain evidence and exhibits presented to the jury on the question of intentional interference. Respondent further argued

that it was improper for the purposes of a jury verdict for the Court not to have separated the breach of supply relationship claim and the intentional interference claim.

On November 22, 1978, the Tenth Circuit ruled that it did not have jurisdiction as to any aspect of the case. It stated that the provisions of § 211(b)(2) of ESA, providing TECA with exclusive jurisdiction of all appeals of district court cases or controversies arising under ESA and EPAA, covered this case.

Both petitioner and respondent filed Petitions for Rehearing, asking the Tenth Circuit to take at least certain portions of the appeal. For the purposes of the Petition for Rehearing, petitioner dropped all claims except for the request to reinstate punitive damages.

It was argued that argued that TECA will not take jurisdiction of any portion of an appeal not specifically part of or directly arising from the Federal laws it is to interpret. Therefore, the refusal of the Tenth Circuit to take any part of the case denied the parties the right of appellate court review on the non-TECA matters.

On December 20, 1978, both Petitions for Rehearing were denied by the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

POINT I

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN TECA AND THE TENTH CIRCUIT

TECA's position is that its jurisdictional grant excludes anything which does not specifically arise under the Federal legislation it has been called

upon to interpret. On the other hand, the position taken by the Tenth Circuit in this case is that if any part of a case involves questions arising under TECA administered Federal statutes, it will not entertain the case. Therefore, despite the provisions of 28 U.S.C. §§ 1291, 1294 establishing the right of appeal, petitioner is without remedy or right of appeal as to those issues in its appeal which do not arise specifically under TECA administered Federal law. The result which has occurred in this case surely was not envisioned by Congress in its passage of ESA and the creation of TECA.

Shortly after it was created, TECA issued two decisions which basically set the guidelines for its subsequent determinations on the limits of its jurisdiction. In United States v. Cooper, 482 F.2d 1393 (TECA 1973), the Ninth Circuit Court of

Appeals, determining that it had no jurisdiction in the case, transferred the entire matter over to TECA. As the case itself demonstrates, there were no clear guidelines at the time as to what cases should be appealed to a Circuit Court and what cases should be appealed to TECA. Therefore the Ninth Circuit tried to preserve the case for determination by TECA since it found it had no jurisdiction itself over the case.

The ruling in Cooper by TECA is important from two standpoints. First, TECA determined that it could not take jurisdiction of a case via a transfer from another circuit court. The appeal had to be filed within the normal appeal period directly from the district court to TECA. This meant that all of those issues in the case which should have been appealed to TECA were dismissed because the appeal

period had run. Second, TECA determined that the case was severable and that there were several parts of the appeal which should have been retained by the Ninth Circuit, despite the fact that the Ninth Circuit did not take cognizance of the same. Therefore, as to the non-TECA issues, TECA declared itself without jurisdiction and ruled that the matter had in reality never left the Ninth Circuit.

The Cooper case demonstrates the narrow view TECA takes of its own jurisdiction. This narrow view was more clearly explained in subsequent cases issued by TECA. In the case of Associated Gen. Con., Okl. Div. v. Laborers Int. U., Loc. 612, 489 F.2d 749 (TECA 1973) the court accepted an appeal which had been made directly to it from the district court but refused to review certain portions of the case because it felt it

had to limit its attention "to questions arising under the Economic Stabilization Act of which we had jurisdiction." Id. at 750.

In the case of Spinetti v. Atlantic Richfield Co., 522 F.2d 1401 (TECA 1975), the court held that certain counts of the complaint were not reviewable by TECA

> since such claims are not controversies arising under any title of the Economic Stabilization Act or the Allocation Act or under regulations or orders issued thereunder. The antitrust, Fair Trade, and contractual claims are appealable only to the Ninth Circuit Court of Appeals under 28 U.S.C. § 1291.
>
> Id. at 1403 (Emphasis added).

TECA then cited both Associated General Contractors and Cooper as authority for its decision.

Subsequently, in Long View Refining Co. v. Shore, 554 F.2d 1006 (TECA 1977), the court in a footnote said:

As we indicated in Spinetti v.

> Atlantic Richfield Company, 522 F.2d 1401, 1403, (Em. Ap. 1975), this court does not have jurisdiction over claims such as the anti-trust and contractual claims made in the plaintiff's complaint.
>
> Id. at 1009.

The citation of the above cases shows the definite course set by TECA for itself in excluding on jurisdictional grounds any aspect of a case which does not specifically have its roots in EPAA or ESA. On the other hand, it is just as clear from the instant case that the United States Court of Appeals for the Tenth Circuit will refuse to take any part of a case if the appeal contains any ESA or EPAA claims.

In the instant appeal a demand for the reinstatement of punitive damages, a common law remedy, has been made. That in turn has its origins in this case in the common law tort of interference with a

business relationship as well as in the claim of contractual breach. Since the punitive damages issue would clearly not be reviewable by TECA under its guidelines of jurisdiction, the Tenth Circuit should have at least taken that much of the appeal. The Tenth Circuit's decision not to do so leaves parties in general and petitioner in particular without an appeal right on non-EPAA or ESA claims solely for the reason that one or more such non-EPAA or ESA points on appeal have been joined with EPAA or ESA claims.

It is obvious that Congress in creating TECA did not envision it was thereby creating a number of non-appealable claims which are characterized only by reason of their being associated with TECA related claims when before the district court. In reality the jurisdiction of TECA has been carved out

of that which has been granted to the Circuit Courts. All non-TECA claims still belong to the Circuit Courts, regardless of how many TECA claims with which they may be associated at the time of trial, if it doest not take a resolution of the TECA claims to determine the non-TECA ones. Cf., Citronelle - Mobile Gathering, Inc. v. Gulf Oil Corp., CCH Federal Energy Guidelines, Paragraph 26,125 (TECA 1979); M.-Spiegel & Sons Oil Corp. v. B.P. Oil Corp., 531 F.2d 669 (2nd Cir. 1976).

This Supreme Court, on facts not unlike the instant case, remanded a case to the Tenth Circuit after the Tenth Circuit had earlier ruled that the case was solely within the jurisdiction of TECA. Bray v. United States, 423 U.S. 73 (1975). In that case, the IRS issued a subpoena to petitioner Bray, directing him to produce some records in connection with

alleged violations of ESA. Because of failure to comply with the subpoena, petitioner was convicted of criminal contempt. On appeal, the Tenth Circuit held that it had no jurisdiction because of the exclusive jurisdiction provision of § 211(b)(2) of ESA. This Court ruled that a contempt charge did not come under the umbrella of ESA and a review of the same by TECA

> is not necessary to assure uniform interpretation of the substentive provisions for the stabilization scheme. Indeed, a requirement of such review would only serve to undermine the prompt resolution of Stabilization Act questions by burdening the TECA with additional appeals.
>
> Id. at 75.

This Court further ruled in Bray that even though the contempt charge was filed

> in connection with an investigation of Stabilization Act violations, it was not dependent on the existence of such violations

or even the continuation of the investigation.

Id. at 76.

In its substance, this case presents exactly the same question as Bray, namely whether in a case having claims of EPAA violations, an issue which does not directly arise under any provision of EPAA or ESA can only be reviewed by TECA. The difference in this case, as opposed to Bray, is that admittedly there are some parts of this appeal which, upon close investigation, are matters for TECA. These issues include the definition of "posted" prices and the claims for treble damages, civil penalties, and attorney's fees. In Bray there was only one issue on appeal. Otherwise, the two cases are parallel. It does not require a determination of any EPAA provisions in order to resolve the question whether the punitive damages should be reinstated.

Hence, the guidelines set up by Bray should not be any different simply because of that one difference between the two cases.

It is important that there be reviewability of all aspects of a case. The present decision of the Tenth Circuit does not permit such reviewability of a district court opinion, in violation of the structure of the Federal judiciary system and 28 U.S.C. §§ 1291, 1294. The granting of the Writ would not only be in the interest of the merits of this specific case, but also would give relief in other future cases which surely will arise under similar facts.

As noted herein, petitioner's principal reason for the appeal to the Tenth Circuit was to seek reinstatement of the punitive damages it was originally awarded by the jury. Over three fourths

of its brief was devoted to that one subject. The question was the sufficiency of the evidence to permit the jury to determine as they did. The interpretation of law and fact on that point has not even the slightest foundation or basis in ESA or EPAA. It is a matter totally and solely within the capacity and jurisdiction of the Tenth Circuit to decide.

Because the Tenth Circuit has treated the instant case in its entirety as being within TECA's jurisdiction, and since it is clear that TECA would not have taken the punitive damages issue of the case had it been appealed to TECA, and in light of the mandate of Congress that TECA should not take any portion of a case except those parts which are specifically within TECA's province, this Court should grant a

Writ of Certiorari to the Tenth Circuit to review this case.

POINT II

THIS COURT SHOULD PROVIDE A TRANSFER OF CASES FROM CIRCUIT COURTS TO TECA ON MATTERS THAT ARE SOLELY WITHIN THE JURISDICTION OF TECA

The Cooper case emphasizes the situation which needs to be corrected by this Court. Not since the days of the old English writs has a party been put to more of a guessing game than now in trying to determine the jurisdiction of the Circuit Courts and TECA in matters relating to EPAA and ESA. Based on the decision of the Tenth Circuit Court of Appeal in the instant case and the TECA cases cited herein, a party who has to guess whether to appeal a District Court decision to TECA or to the Circuit Court, is automatically out of court with no recourse if he guesses incorrectly.

In Cooper, the Ninth Circuit attempted to transfer the case over to TECA, which refused jurisdiction. In Associated General Contractors the appellant guessed correctly on some of the issues but incorrectly as to some of the others. As to the incorrect guesswork the right to appeal was totally lost. This guesswork should be eliminated. More importantly, an appellant should not be put to the burden of guessing at his peril.

TECA is undoubtedly correct in its view of its limited jurisdiction. Its purpose is not to review those matters which would normally go to a Circuit Court. Its purpose is only to determine matters for which it has been specially created and for which it has a special expertise and background. Nor, as this

Court said in Bray, should TECA be burdened with matters just as easily resolved by the Circuit Courts.

It is respectfully submitted that in case of doubt, a party should be able to present his appeal to the appropriate Circuit Court and then have that Court determine which matters fall within its jurisdiction. The Circuit Court should then be able to refer the rest of the matters over to TECA for jurisdiction. If necessary for jurisdictional purposes, TECA could then refer some parts of the case back.

Without the above procedure, a party is forced to appeal all aspects of his entire case to both TECA and to a Circuit Court and to present two parallel briefs to both courts. Even then one of the courts may determine it has no jurisdiction over a matter, only to have the other

court also declares itself without jurisdiction over the identically same matter.

The conflict between TECA and the Circuit Courts must be resolved in order that the appellate system of the Federal judicial system can work properly. A resolution is also necessary for the proper economy of TECA.

It is therefore respectfully requested that this Court grant a Writ of Certiorari to the Tenth Circuit for a determination as to which issues in this case are within the jurisdiction of the Tenth Circuit. In particular this Court should grant the writ in order to direct the Tenth Circuit to accept and determine the issue of punitive damages. There should also be a further determination that those issues which are not within the Tenth Circuit jurisdiction be transferred

over to TECA. Since petitioner's appeal was timely filed with the Tenth Circuit, TECA should then be directed to take jursidiction of the same as though originally filed with TECA.

CONCLUSION

Wherefore, petitioner respectfully prays that a Writ of Certiorari be granted.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 77-1410 and 77-1432

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation,	)	
Plaintiff, Appellee and Cross-Appellant,	)	Appeal from the United States District Court for
vs.	)	the District of Utah
RELAND JOHNSON,	)	(D.C. No. NC-75-3)
Defendant,	)	
and	)	
JOHNSON OIL COMPANY, INC.,	)	
Defendant-Appellant and Cross-Appellee.	)	

Submitted: September 29, 1978

586 F.2d 1375

Robert S. Campbell, Jr. (Duane R. Smith on the brief) of Watkiss and Campbell, Salt Lake City, Utah, for Appellee-Cross Appellant Mountain Fuel.

Dan S. Bushnell (Joseph C. Rust on the brief) of Kirton, McConkie, Boyer and Boyle, Salt Lake City, Utah, for Appellant-Cross-Appellee Johnson Oil Company, Inc.

Before SETH, Chief Judge, BARRETT and DOYLE, Circuit Judges.

BARRETT, Circuit Judge.

This complex litigation originated on June 28, 1974, when plaintiff, cross-appellant here, Mountain Fuel Supply Company, a Utah corporation (Mountain Fuel) filed its complaint against defendants, appellants here, Reland

Johnson and Johnson Oil Company, Inc., a Utah corporation (Johnson Oil) in the state District Court of Davis County, Utah. All parties are residents of the State of Utah. The cause was removed to the United States District Court for the District of Utah, Northern Division, after Johnson filed an Answer and Counterclaim and petitioned for removal on January 6, 1975. Following extensive pleading and discovery the cause was tried to a jury which, on June 23, 1976, returned a general verdict in favor of Johnson on its counterclaim. It awarded Johnson $65,000 in compensatory damages and $110,000.00 in punitive damages. Upon motion by Mountain Fuel, the court struck the award of punitive damages. Judgment was entered awarding Johnson damages in the amount of $65,000.00. Both parties appeal.

After this appeal was docketed and calendared, this Court, sua sponte, requested that the respective parties brief the question of this Court's subject matter jurisdiction. We assumed that in view of the lack of diversity of citizenship between the parties, this action was one arising under federal law within the meaning of 28 U.S.C.A. § 1311 justifying its removal from state court to federal district court pursuant to 28 U.S.C.A. § 1441. Our concern was whether the appeal falls within the jurisdiction of this Court or the exclusive jurisdiction of the Temporary Emergency Court of Appeals (TECA). We shall focus on the appellate jurisdictional issue which we believe to be dispositive.

The Mountain Fuel complaint filed in the state court and removed to the federal

district court alleges, in summary, that: on July 15, 1970, Mountain Fuel entered into a written agreement with Johnson whereby Mountain Fuel agreed to sell and Johnson agreed to buy all condensate which it owned, controlled or produced from the Dry Piney Field in Sublette County, Wyoming, commencing August 1, 1970 to July 1, 1971, and thereafter until terminated upon thirty-day notice, at the tank truck loading racks of said unit at an amount equal to "the per barrel price posted on date of delivery by Pan American Petroleum Corporation (AMOCO) for Southwestern Wyoming crude oil of forty (40) degrees to forty-four (44) degrees a.p.i. gravity, plus five cents (5) per barrel, which posted price on the date hereof is Three Dollars and Twenty-Eight Cents ($3.28) per barrel of forty-two (42) gallons" [R., Vol. V, p. 9]; that thereafter nugget

crude oil was substituted for condensate by agreement of the parties; on "August 17, 1973, the Cost of Living Council of the United States issued its 'Phase IV' oil regulations, a copy of which is attached and incorporated herein by reference. That on or about December 19, 1973, the Cost of Living Council issued further regulations governing the price ceiling on oil, a copy of which, as published in the Federal Register, is hereto attached and incorporated herein by reference." (Emphasis supplied.) [R., Vol. V, p. 5]; on November 16, 1973, Mountain Fuel notified Johnson by letter that in view of the Phase IV price controls it would, effective December 1, 1973, charge the ceiling price of $4.65 per barrel and that, in addition, under the applicable federal regulations, it would charge the applicable AMOCO field

posted price of $5.83 plus 3 cents or $5.86 per barrel of that referred to in the regulations as "new" or "released old" oil; thereafter Mountain Fuel delivered to Johnson billed at $128,652.57 in accordance with the pricing arrangements established by the federal price ceiling regulations; Johnson has refused to pay the principal sum of $40,585.00; Mountain Fuel prayed for judgment in principal sum of $40,585.50, interest at the rate of 7 percent per annum and costs.

Johnson filed an Answer and Counterclaim in the state court proceeding. The Answer acknowledged receipt of the Mountain Fuel letter of November 16, 1973, setting forth proposed changes under the Federal Energy Office Regulations to which it agreed, but specifically denied that it had agreed to pay any increased price for oil or that Mountain Fuel had in fact any

"new oil" or "released old oil" at its disposal. Certain affirmative defenses were pleaded. In its Counterclaim, Johnson alleged that Mountain Fuel: breached the agreement of July 15, 1970, in violation of the Emergency Petroleum Allocation Act of 1973 and the regulations promulgated thereunder; refused to supply crude oil as provided under the agreement and sold the oil to Allied Chemical Company; and interfered with the business relationship between Johnson and Allied Chemical Company; and interfered with the business relationship between Johnson and Allied Chemical Company, resulting in a violation of the Emergency Petroleum Act of 1973 and the regulations promulgated thereunder. Johnson prayed for $70,000.00 compensatory damages, $5,000.00 as civil penalties under the regulations promulgated pursuant to the Emergency

Petroleum Allocation Act of 1973, costs and other relief. Johnson thereafter filed an Amended Answer and Counterclaim in the state court. In addition to violations charged in derogation of the Emergency Petroleum Allocation Act of 1973 and the regulations promulgated pursuant thereto, Johnson alleged overcharges in violation of the Economic Stabilization Act of 1970, and other causes. The prayer of the Amended Answer and Counterclaim was for dismissal of Mountain Fuel's complaint, award to Johnson of $200,000.00 as damages on its First Cause of Action, together with $600,000.00 as civil penalty provided by the Economic Stabilization Act of 1970, $105,000.00 as damages for the Second Cause of Action, together with $762,500.00 as civil penalty provided by the Economic Stabilization Act of 1970, the sum of $80,000.00 as damages for the

Third Cause of Action, attorneys fees, and costs.

The substantive issues posed by the allegations contained in the pleadings filed by the parties in the state court as of January 5, 1975, when Johnson filed its Petition for Removal to the federal district court included: the applicability of the amounts (prices) Mountain Fuel was entitled to charge Johnson and the sums Johnson owed based on the validity of regulations promulgated pursuant to the Emergency Petroleum Allocation Act of 1973 which purport to alter or affect the initial agreement, the interpretation of the contract-agreement in light of the "applicable" price posted by AMOCO plus 3 cents per barrel, known as the "posted price"; a subsequent offer submitted to Mountain Fuel to purchase the oil at a higher price known as "The Cowboy

Contract Price of April 1, 1973"; the "ceiling price" regulation established by the Cost of Living Council under the Economic Stabilization Act of 1970 (ESA), § 210(a), 12 U.S.C.A. § 1904 Note and the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C.A. § 751, et seq., relating to interpretation and price of "new oil" and "released old oil" at Mountain Fuel's disposal for sale; whether Mountain Fuel's refusal to supply crude oil to Johnson from and after April 1, 1974, was a breach of contract in violation of the EPAA of 1973 and the regulations promulgated thereunder; and whether Mountain Fuel overcharged Johnson for oil alleged to be "new oil" in violation of § 210 of the ESA of 1970.

15 U.S.C.A. § 754(a)(1) of the EPAA of 1973 incorporates by reference §§ 205-

211 of the ESA of 1970 and all regulations promulgated thereunder.

12 U.S.C.A. § 1904 Note (Supp. 1977) of the ESA of 1970 provides in § 211(a):

> The district courts of the United States shall have exclusive jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of Chapter 89 of title 28, United States Code [Chapter 89 of Title 28]. (Emphasis supplied.)

Following removal and prior to commencement of the trial before the jury, Johnson stipulated that it owed Mountain Fuel the sum of $19,629.50. This disposed of the claim on Mountain Fuel's complaint. The case was then tried and it went to the jury on Johnson's counterclaim. The trial court, upon motion, set aside the jury verdict of $110,000.00 for punitive damages in favor of Johnson and against Mountain Fuel. Judgment was then entered on behalf of Johnson representing the verdict award of $65,000.00 compensatory damages, together with interest and costs. In addition, the judgment (a) ordered that Johnson be entitled to receive (from Mountain Fuel) "125 barrels of base production control level crude oil pursuant to and during the existence of the December 1, 1973 EPA (Emergency Petroleum Allocation) Regulation, 10

C.F.R. § 211.64(a), so long as the same is unaltered and in effect and so long as there is no overall shortage of production, and other regulatory and contractual requirements are satisfied by Johnson Oil Company, Inc." [R., Vol. VI, p. 328.] and (b) that Johnson's claims for recovery of treble damages, civil penalties, attorneys fees and costs "under Sections 208(b) and 210(b) of the 1970 Economic Stabilization Act" be denied. [R., Vol. VI, p. 329.]

After the appeal and cross-appeal were docketed and calendared in this Court, we directed, on our own motion, that the parties address a section of their respective briefs to the question whether their appeals are properly before this court rather than before the TECA. This issue is, in our view, dispositive.

Johnson adopted and agreed with the jurisdictional issue presented in Mountain

Fuel's brief. [Brief of Johnson, p. 4.] Thus, both parties are in agreement with the propositions presented under the caption "Jurisdiction" of Mountain Fuel's brief. [Brief of Mountain Fuel, pp. 19-25.] The parties contend that this Court has jurisdiction to hear and adjudicate each of the claims of tbe respective parties in that this is not a case which "arises under" the Allocation Act of 1973, supra. While giving hesitant credence to the proposition that 12 U.S.C. § 1904 Note (§ 211 of the ESA), as incorporated in the EPAA of 1973 does vest exclusive jurisdiction in the TECA as to those matters which "arise under" the subject Acts and regulations, the parties urge that such does not apply in the case at bar because the complaint of Mountain Fuel filed in the state court "did not, in any sense involve itself with or raise substantive

issues concerning either the 1970 or 1973 Acts or any regulations promulgated thereunder" and that ". . . the Complaint alleges a cause of action sounding solely in breach of contract." [Brief of Mountain Fuel, p. 23.] If this court were to accept the contentions so advanced and the authorities cited and relied upon in the briefs, we would be compelled to hold and conclude that not only is this Court without jurisdiction on appeal but, more astonishingly, that the federal district court was without jurisdiction to hear the matter following removal. The reasons, we believe, are obvious. First, there exists no diversity of citizenship between the parties meeting the jurisdictional requirements of 28 U.S.C.A. § 1332. Accordingly, if the action --as reflected solely by the Mountain Fuel complaint filed in the state court --

did not, as contended by the parties, "in any sense, involve itself with or raise substantive issues concerning either the 1970 or 1973 Acts or any regulations promulgated thereunder" [R., Vol. V, pp. 4-18.], but simply alleged a cause of action sounding solely in breach of contract (as contended) which did not implicate any applicable federal laws, rules, regulations or orders, then the removal from the Utah state court was improvident and without jurisdictional justification as a matter of law! This position is the more difficult to reason upon when we consider that the crux of the parties' argument is that the test for determining whether an action "arises under" the Constitution, treaties or laws of the United States giving rise to jurisdiction under the "federal question" authority of 28 U.S.C.A. § 1331(a) (no

diversity required) must be determined solely by the presence of well-pleaded allegations appearing from the face of the complaint and that the Mountain Fuel complaint does not invoke any federal laws. If this contention of the parties were to control, we would be compelled to hold that the federal district court lacked subject matter jurisdiction. This would be so simply because, lacking diversity of citizenship between the parties and the existence of a "federal question," only the breach of contract action would remain, to be governed exclusively by the law of Utah. Under such circumstances no cause would exist for removal from the state court to the federal district court.

The parties contend that in determining the existence of the "federal question" jurisdiction under 28 U.S.C.A.

§ 1331(a) justifying removability from a state court to a federal court one must look solely at the plaintiff's complaint rather than to any subsequent pleading or the petition for removal. We agree. This is, of course, a fundamental rule. Barron & Holtzoff, Federal Practice and Procedure, (Wright Ed.) Vol. I, § 102, p. 471; Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950); Great Northern Railyway Company v. Alexander, 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713 (1918); Arkansas v. Kansas and Texas Coal Co., 183 U.S. 185, 22 S.Ct. 47, 46 L.Ed. 144 (1901); Mescalero Apache Tribe v. Martinez, 519 F.2d 479 (10th Cir. 1975); Seneca Nursing Home v. Kansas State Board of Social Welfare, 490 F.2d 1324 (10th Cir. 1974), cert. denied, 419 U.S. 841, 95 S.Ct. 72, 42 L.Ed.2d 69 (1974); Slattery v. Arapahoe

Tribal Council, 453 F.2d 278 (10th Cir. 1971); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971); Chandler v. O'Bryan, 445 F.2d 1045 (10th Cir. 1971), cert. denied, 405 U.S. 964, 92 S.Ct. 1176, 31 L.Ed.2d 241 (1972); Metropolitan Paving Company v. International Union of Operating Engineers, 439 F.2d 300 (10th Cir. 1971), cert. denied, 404 U.S. 829, 92 S.Ct. 68, 30 L.Ed.2d 58 (1971); Simpson v. State of Utah, 365 F.2d 185 (10th Cir. 1966). The parties argue that the Mountain Fuel complaint alleges a cause of action sounding solely in breach of contract and that "While it is true that Paragraphs 6 and 7 of the Complaint (R. 5) allude to 'Phase IV' oil regulations promulgated by the CLC, such does not change the essence or character of the Complaint. The said regulations are neither attacked nor sought to be enforced. Nowhere on the

face of the Complaint does Mountain Fuel ask for an interpretation or application of the regulations." [Brief of Mountain Fuel, p. 23.] Thus, if we were to adopt, accept and concede this argument of the parties we would surely be compelled to hold that the federal district court lacked subject matter jurisdiction and that the judgment must be vacated. This is so because (again accepting for the purpose of this discussion the contentions advanced by the parties) (a) there is no diversity of citizenship between the parties justifying removal of the cause from state court to federal district court as required pursuant to 28 U.S.C.A. § 1331 and (b) removal is not justified on the basis that a substantial federal question is asserted on the fact of the complaint.

We hold, however, that the Mountain Fuel complaint filed originally in the

Utah state court does, on its face, assert a substantial federal question under the laws and regulations of the United States independent of allegations or affirmative relief asserted in Johnsons' Answer and Counterclaim or Petition for Removal. The general rule is that if a case arising (in fact) under the laws of the United States is filed in state court but is non-removable to a federal district court for want of assertion of the federal question on the face of the complaint, jurisdiction can attach only by the voluntary amendment of the plaintiff's pleadings. Great Northern Railway Company v. Alexander, supra. Thus, if we were to honor the contention of the parties relative to "want" of a federal question on the face of Mountain Fuel's complaint, it was the duty of the federal district court to remand the case to the state court when it

became manifest upon the face of the complaint or the petition for removal that the case has been improperly removed to the federal court. Cameron v. Hodges, 127 U.S. 332, 8 S.Ct. 1154, 32 L.Ed. 132 (1888).

A case "arises" under the laws of the United States if it clearly and substantially involves a dispute or controversy respecting the validity, construction or effect of such laws which is determinative of the resulting judgment. Shulthis v. McDougal, 225 U.S. 561, 32 S.Ct. 704, 56 L.Ed. 1205 (1912). Thus, if the action is not expressly authorized by federal law, does not require the construction of a federal statute and/or regulation and is not required by some distinctive policy of a federal statute to be determined by application of federal legal principles, it does not arise under

the laws of the United States for federal question jurisdiction. Lindy v. Lynn, 501 F.2d 1367 (3rd Cir. 1974.)

We need not again detail the Mountain Fuel complaint in relation to its invocation of a "federal question" on its face. We hold that it does invoke a substantial federal question, contrary to the contention of the parties. The very predicate for the damage claim of Mountain Fuel in the breach of contract sense is that Mountain Fuel is entitled to a sum in excess of the originally agreed contract price for crude oil based upon the "Phase IV" oil regulations issued by the Cost of Living Council on August 17, 1973, (promulgated pursuant to the ESA of 1970, supra) which were attached to said complaint "and incorporated" by reference therein, coupled with Mountain Fuel's allegations that the "ceiling price" or

"posted price" under the applicable federal regulations which it charged Johnson for "old," "released," or "new" oil justified the $5.86 per barrel charge. The federal regulations above referred to are those promulgated under the EPAA of 1973, supra. That Act incorporated by reference the ESA of 1970. Thus, on its face, the Mountain Fuel complaint did in fact invoke a substantial federal question involving the construction, applicability and effect of the aforesaid federal acts and governing regulations relating to the monetary awards claimed.

The general rule is that a motion to dismiss an action for lack of subject matter jurisdiction will be denied even though the allegation of jurisdiction is insufficient or entirely lacking if there are facts pleaded in the complaint from which jurisdiction may be inferred in

essence and effect. Wright and Miller, Federal Practice and Procedure: Civil § 1350, p. 550. A complaint is to be construed broadly and liberally as to do substantial justice. Mitchell v. Parham, 357 F.2d 723 (10th Cir. 1966); 12 ALR 2d Anno., pp. 1-74, Federal Courts' Jurisdiction. As heretofore noted, the Mountain Fuel complaint set forth a copy of the "Condensate Agreement" of July 15, 1970, by reference "attached hereto, referred to hereby and incorporated herein." [R., Vol. V., p. 4.] In addition, the complaint set forth a copy of the "Phase IV oil regulations" promulgated by the Cost of Living Council under the Economic Stabilization Program and the Cost of Living Council's regulations governing the "price ceiling on oil" as published in the Federal Register which were "hereto attached and

incorporated herein by reference." [R., Vol. V, p. 5.] Finally, attached to the complaint was a Mountain Fuel letter of November 16, 1973, to Johnson Oil notifying that future pricing arrangements were subject to the "federal price ceiling regulations." [R., Vol. V, p. 5.] Thus, it is clear that while the relationship between Mountain Fuel and Johnson Oil was predicated upon the Condensate Agreement of July 15, 1970, that Mountain Fuel's claims, as discerned from the face of its complaint, is that because of the intervening federal laws and regulations there is a substantial federal question involved fn the controversy. Mountain Fuel alleges that because of the federal laws and regulation it was entitled to more monies for the sale of oil to Johnson Oil than the prices set forth in the written agreement.

We first observe that any contention that a substantial federal question was not set forth "on the face" of the Mountain Fuel complaint is without merit. Fed. Rules Civ. Proc. rule 10(c), 28 U.S.C.A. provides that "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Wright & Miller, Federal Practice and Procedure: Civil § 1327. In this case, the Mountain Fuel complaint, originating by specific written contract, finds its remedial prayer anchored to an interpretation and applicability of federal laws and regulations governing the price or prices it may legally charge Johnson Oil under and by reason of the aforesaid federal laws and regulations. Thus, the federal claim or claims asserted by Mountain Fuel on the face of its complaint clearly present a substantial

federal question or questions arising under the laws of the United States.

Even though a complaint involves a state claim still, as a matter of judicial economy the federal court has power to entertain the pendent claim if the federal claim arises "under the Constitution, the Laws of the United States and the treaties made" and the relationship between the state claim and the federal claim permits the conclusion that the entire action before the court compromises but one case. The federal claim must, of course, have sufficient substance to confer subject matter jurisdiction on the federal court. United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction, § 3567. The criteria is met here.

We hold that it is not necessary to rely exclusively on the Mountain Fuel complaint in order to justify removal on the "federal question" basis. The amended Johnson Answer and Counterclaim filed in the state court, coupled with its Petition for Removal, "fits" the four corners of 12 U.S.C.A. § 1904 Note (Supp. 1977) of the ESA of 1970, § 211(a), supra, in that removal jurisdiction is specially recognized if any issue raised by way of defense challenges the validity of agency action under the two subject federal acts. Johnson's Amended Answer and Counterclaim challenged the validity of certain regulations promulgated pursuant to the EPAA of 1973 which Johnson alleged to directly affect its cause, i.e., those relating to "old oil" and "new oil." These grounds were specifically relied on

in Johnson's Petition for Removal. [R., Vol. V, pp. 1-3.]

The parties, per briefs, rely upon the identical jurisdictional arguments heretofore discussed in support of their contention that this Court, rather than the TECA "has a firm hand on subject matter jurisdiction on each and all of these issues, including 'posted price' and 'allocation' of Dry Piney crude oil, on appeal herein, whether those issues are raised under the cross-appeal of Mountain Fuel or the main appeal of Johnson." [Brief of Mountain Fuel, p. 25.] We disagree.

The TECA was created by Congress in the ESA of 1970, 12 U.S.C.A. § 1904. Note § 211(b)(2) of that Act provides, inter alia:

> Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of

all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder . . . . (Emphasis supplied.)

15 U.S.C.A. § 754(a)(1) of the EPAA of 1973 incorporates by reference § 205-211 of the ESA of 1970, as amended, in effect November 27, 1973, which ". . . shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issues, or such action had been taken under the Economic Stabilization Act of 1970; . . . ."

In Bray v. United States, 423 U.S. 73, 96 S.Ct. 307, 46 L.Ed.2d 215 (1975) the Supreme Court said:

As part of the Economic Stabilization Act Amendments of 1971,

Congress created the TECA (Temporary Emergency Court of Appeals) and vested it with "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." § 211(b)(2), 85 Stat. 749. This judicial-review provision was designed to provide speedy resolution of cases brought under the Act and "to funnel into one court all the appeals arising out of the District Courts and thus gain in consistency of decision." S. Rep. No. 92-507, p. 10 (1971). The provision thus carved out a limited exception to the broad jurisdiction of the courts of appeals over "appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. (Emphasis supplied.)

423 U.S., at p. 74, 96 S.Ct. at P. 309.

We have previously noted that the issues tried in this case were those framed by the Johnson Counterclaim. The allegations set forth in that Counterclaim invoked and implicated United States laws under the ESA of 1970, 12 U.S.C.A. 1904

Note (Supp. 1977); the EPAA of 1973, 15 U.S.C.A. §§ 751, et seq., and the implementing regulations duly promulgated thereunder. 6 CFR § 150.353 (1974); 10 CFR § 211.63 (a) (1977). These regulations spell out the two-tier pricing system established in 1973 which provides that "old oil" may may not be sold above the lower tier ceiling price, 10 CFR § 212.72 (1977) and that "new oil" may not be sold above the upper tier ceiling price, 10 CFR § 212.74 (1977). Allegations against Mountain Fuel involve its alleged disregard of the government "freeze order," making "illegal" charges above the "ceiling price," and requiring Johnson to purchase "old," "released" and "new" oil at illegal prices contrary to government regulations. Furthermore, Johnson directly challenged the validity of certain regulations promulgated

pursuant to the EPAA of 1973 as interpreted by officials of the Federal Energy Administration, which agency action allegedly destroyed the "competitive viability of [Johnson] . . . and are therefore invalid." [R., Vol, V., p. 2.] Seemingly strict contract law allegations advanced by Johnson against Mountain Fuel involve disregard of and ultimate wrongful termination of the written contract and wrongful and intentional interference with Johnson's contractual relationship with Alllied Chemical Company. That these "contract law" allegations are not separable from the federal acts and regulations previously discussed herein is best evidenced by these recitals in Johnson's brief:

> . . . on April 9, 1974, it [Mountain Fuel] ceased selling crude oil to Johnson. Mountain Fuel has since then treated the termination matter as though it is totally governed by general

> contract law. This is clearly not the case. Any right to terminate the sales of crude oil has to be found within the language of the price and relationship freeze imposed by the federal government.
>
> [Brief of Johnson, pp. 53, 54.]

We agree.

We hold that this court is without jurisdiction to entertain this appeal. In our view, exclusive jurisdiction vests in the TECA by virtue of 28 U.S.C.A. § 1331 (Supp. 1977); 15 U.S.C.A. § 754(a)(1), which incorporates § 211 of the ESA of 1970, 12 U.S.C.A. § 1904 Note (Supp. 1977). See also: Mary's Hospital of East St. Louis, Inc. v. Ogilvie, 496 F.2d 1324 (7th Cir. 1974); Exxon Corporation v. Federal Energy Administration, 516 F.2d 1397 (Temporary Emergency Court of Appeals, 1975); Associated General Contractors, Oklahoma Division v. Laborers International Union, Loc. 612, 489 F.2d

749 (Temporary Emergency Court of Appeals, 1973).

Our holding is buttressed by Mountain Fuel's Answering Brief to the appeal of Johnson and the Reply Brief in Mountain Fuel's Cross-appeal, to-wit:

> From the outset of appellate proceedings before this Court, it was clear that the issues under the JOHNSON appeal and the MOUNTAIN FUEL Cross-appeal would involve pricing concepts and regulations that could fall within the jurisdiction of the Temporary Emergency Court of Appeals (TECA). In point of fact, the opening Brief of MOUNTAIN FUEL poses the query of whether TECA jurisdiction is present in this case with respect to the interpretation of "posted price." That query is also at large with respect to the claim made by JOHNSON in his appeal on treble damages, attorneys' fees, and "civil penalties" under the Economic Stabilization Act of 1970.
>
> [Brief of Mountain Fuel, p. 28.]

WE DISMISS for lack of subject matter jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation,	:	
Plaintiff and Counter-Defendant,	:	FINAL JUDGMENT AND ORDER ON PARTICULAR ISSUES
vs.	:	AND JUDGMENT ON VERDICT OF JURY
RELAND JOHNSON and JOHNSON OIL COMPANY, INC.,	:	
Defendants and Counter-Plaintiffs.	:	

The above-referenced case having come on for trial on all issues raised by the Complaint of Plaintiff and Counterclaim of the Defendant before the Honorable WILLIAM G. JUERGENS, Senior United States District Judge sitting by designation, both parties having been represented by their counsel, respectively, and certain issues of fact having been presented to and tried before

the Court sitting with a jury and other questions of fact and law having been reserved to and determined by this Court;

And the Court being now fully advised as to each and all of the issues of law and fact anywise appertaining in the premises and said issues having been otherwise fully resolved, and for good cause shown pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Final Judgment and Order as to all matters of law and fact is herewith entered in the action, as follows, to-wit:

I.

Based upon the Stipulation of the defendant entered herein at the outset of trial on the 21st day of June, 1976 as to the Complaint of Plaintiff, Judgment be and the same is hereby entered in favor of the Plaintiff, MOUNTAIN FUEL SUPPLY COMPANY and against the Defendant JOHNSON

OIL COMPANY in the sum and amount of $19,628.50, together with pre-judgment interest of $2,533.30, or a total of $22,161.80 together with interest thereon as by law provided from the date of the entry of this Judgment until the same is paid and satisifed.

II.

That based upon the verdict of the jury returned in open Court on the 23rd day of June, 1976, relative to the Counterclaim of JOHNSON OIL COMPANY, INC., Judgment be and the same is hereby entered in favor of the Counterclaimant, JOHNSON OIL COMPANY, INC. and against the Counter-Defendant, MOUNTAIN FUEL SUPPLY COMPANY in the sum of $65,000.00 compensatory damages, together with interest thereon from the date of this Judgment until the same is paid and satisfied, as by law provided. The Counterclaimant JOHNSON OIL

COMPANY, INC. shall also have its taxable costs in the matter.

III.

With respect to the claim of JOHNSON OIL COMPANY for punitive damages against MOUNTAIN FUEL SUPPLY COMPANY and the jury verdict of $110,000.00 returned on June 23, 1976, the Motion of MOUNTAIN FUEL for a Directed Verdict against JOHNSON, was, pursuant to the Interlocutory Order of August 2, 1976, granted, and Judgment be and the same is hereby entered in favor of MOUNTAIN FUEL SUPPLY COMPANY and against JOHNSON OIL COMPANY, INC. on said punitive damage Count.

IV.

That pursuant to the Interlocutory Order of the Court under date of May 26, 1976, it is ordered that JOHNSON OIL COMPANY is entitled to receive 125 barrels of base production control level crude oil

pursuant to and during the existence of the December 1, 1973 EPA Regulation, 10 C.F.R. § 211.64(a), so long as the same is unaltered and in effect and so long as there is no overall shortage of production, and other regulatory and contractual requirements are satisfied by JOHNSON OIL CONPANY, INC.

V.

That with respect to the claims of JOHNSON OIL COMPANY, INC. for the recovery of treble damages, civil penalties, attorney's fees and costs under Sections 208(b) and 210(b) of the 1970 Economic Stabilization Act, judgment be and the same is hereby entered in favor of MOUNTAIN FUEL SUPPLY COMPANY and against JOHNSON OIL COMPANY, INC.

Dated this ____ day of March, 1977.

BY ORDER OF THE COURT

WILLIAM G. JUERGENS
Senior United States
District Judge

CERTIFICATE OF SERVICE

I herewith certify that I am a member of and/or employed in the lawfirm of WATKISS & CAMPBELL, 315 East 2nd South, Salt Lake City, Utah and that in said capacity and pursuant to Rule 5(b), Federal Rules of Civil Procedure, a true copy of the attached FINAL JUDGMENT AND ORDER ON PARTICULAR ISSUES AND JUDGMENT ON VERDICT OF JURY, was caused to be served upon:

DAN S. BUSHNELL, ESQ.
JOSEPH C. RUST, ESQ.
336 South Third East
Salt Lake City, Utah 84111

by depositing a properly addressed envelope containing the same in the U.S. Mails, postage prepaid thereon this 2nd day of March, 1977.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH NORTHERN DIVISION

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation,	)	
Plaintiff,	)	ORDER DETERMINING QUESTIONS OF LAW
vs.	)	NC 75-3
RELAND JOHNSON and JOHNSON OIL COMPANY, INC.,	)	
Defendants.	)	

On December 11, 1975, the plaintiff in the above-entitled case filed a motion for summary judgment. On December 31, 1975, the defendants filed a motion requesting a ruling on matters of law. Both sides have filed extensive materials and oral arguments were heard on several occasions. The court has carefully considered all of the arguments and deems itself to be well advised on the merits. Since the parties are in basic agreement

concerning the underlying facts, the court is prepared to rule upon the issues of law.

One of the major issues presented by the above motions was ruled upon at a hearing on January 23, 1976. At that time, the court ruled that the "Cowboy" contract price was not a proper "posted price" under the Cost of Living Council [CLC] freeze regulations. The court also stated that the $.35 per barrel increase over the May 15, 1973, "freeze" price allowed by the CLC in August of 1973 and the December 19, 1973, additional increase in the price of "old" oil were properly chargeable to Johnson Oil after those dates.

Counsel have agreed to have their motions passed upon by having the court decide several issues as a matter of law.

On January 21, 1976, counsel signed a stipulation stating that the issues were:

> 1. Whether the plaintiff's procedure of allocating "new or released" and "exempt" oil prices among all Dry Piney crude oil purchasers violated either the Federal law and regulations or the terms of the contract between the parties.
>
> 2. Whether the defendants' refusal to pay the "new or released" oil prices and as weighted with "non-exempt" oil prices and as charged equally to all Dry Piney customers, justified plaintiffs termination of sales to defendants.
>
> 3. [Dealt with the "Cowboy contract price" issue which was subsequently decided.]

The two main issues still before the court can be more easily treated by breaking them down.

Amoco Plus $.03

Since the adverse ruling on the "Cowboy" price, the plaintiff has argued that the contract price that the plaintiff had with its Dry Piney field purchasers is the proper May 15, 1973, posted freeze price. That price is "Amoco posting plus $.03" per barrel. The defendants basically contend that the plaintiff abandoned that price when it attempted to charge the illegal "Cowboy" price and that the Amoco plus $.03 contract price suffers from the same infirmities as the rejected "Cowboy" price.

In September of 1973, the CLC defined "posted price" as "a public offer to buy a specific grade of petroleum in a specific geographic area at a specified price." On December 6, 1973, the CLC published a more complete, specific definition:

> "Posted price" means a written statement of crude petroleum prices circulated publicly among sellers and buyers of crude petroleum in a particular field in accordance with historic practices, and generally known by sellers and buyers within the field.

38 F.R. 3577; 10 C.F.R. 212.31 (1975). The latter definition is the one that must be applied by the court.

The contracts with the plaintiff called for a $.03 premium over the Amoco posted price because of the superior quality of the plaintiff's oil. It appears to the court that it would be inequitable to freeze the plaintiff's price at the same level as the price for oil of a lower quality. It appears that the plaintiff's oil was worth "Amoco plus $.03" on May 15, 1975, and that should be the posted freeze price for the

plaintiff's "old" oil if it meets the requirements of the above CLC definition:

1. Written statement of crude oil prices,
2. Circulated publicly among sellers and buyers,
3. In accordance with historic practices, and
4. Generally known by buyers and sellers in the field.

It appears that the "Amoco plus $.03" contract price was generally known by buyers and sellers in the Dry Piney field. The plaintiff has more difficulty in showing that a written statement of that price was circulated publicly among sellers and buyers. The fact that several of the buyers had written contracts that contained "Amoco plus $.03" as the price

does not seem to meet the CLC requirements. It appears, however, that the monthly invoices sent to companies that dealt with the plaintiff, which stated the price term, do qualify as circulated written statements. It is true that each entity did not see the same invoice but the determinative fact is that all of the buyers and sellers received invoices and each invoice contained the same price term (except for the 600 barrels per day contract with Cowboy Oil). The practice of sending invoices with the Amoco plus $.03 price term dates back to 1970 and seems to be of long enough duration to qualify as a "historic practice."

Freeze Regulation

The most difficult problem faced by the court relates to the application of the December 1, 1973, freeze regulation.

The freeze order bas been upheld but there is little judicial precedent to guide this court in interpreting the regulation. Condor Operating Co. v. Sawhill, 514 F.2d 351 (Emer. Ct. App. 1975), cert. denied, 421 U.S. 976 (1975); see Exxon Corp. v. Federal Energy Office, 394 F. Supp. 662 (D.C. 1974). The plaintiff contends that the regulation guaranteed Johnson Oil's right to take a share of the total production and that the regulation was purely an allocation and not a price regulation. The defendants contend that the December 1 freeze order froze types as well as amounts of oil and does affect the price that can be charged. It appears that Johnson Oil was receiving "base production control level" oil on December 1, 1973, the date as of which the relationships were frozen.

The regulation in question was promulgated in January of 1974 and provides:

> All supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of this program . . . .

10 C.F.R. § 211.63(a) (1975) [formerly § 211.64(a)]. An examination of the above wording does not indicate which of the proposed interpretations is proper. The regulation further provides:

> (3) the provisions of this paragraph shall not apply to the seller of any crude oil if the present purchaser of such crude oil refuses, after notice by the seller, to meet any bona fide offer made by the seller, to meet any bona fide offer made by another purchaser to buy such crude oil at a lawful price above the price paid by the present purchaser.

39 F.R. 3908 (Jan. 30, 1974). The above portion of the regulation was amended in May of 1974 so that it applied only to "new" and "released" oil. During the period that concerns the court, however, it referred generally to crude oil. The defendants claim that the above provision gives Johnson Oil a first right of refusal on "new" oil but does not require Johnson to take "new" oil since it was receiving no "new" oil on December 1, 1973. If the defendants were receiving no "new" oil, as they contend, they had no right of refusal with respect to the plaintiff's "new" oil output:

> (b) New crude petroleum may be sold to any person. Once the sale is made, the seller of such new crude petroleum shall continue to sell to that purchaser subject to the provisions of paragraph (a)(1), (2), and (3) of this section.

Id. To have a right of refusal, the defendants would have to be "present purchasers" of that oil on December 1, 1973, which they adamantly maintain they were not. Whoever was purchasing the plaintiff's new oil on December 1, 1973, was the person who had the right of refusal.

The defendants initially argued that the "special release rule," found in 39 F.R. 1924 [212.74(b)] (January 15, 1974); 6 C.F.R. 150.354(3) (1974), that allowed "base production control level" oil to be removed from price controls as "released" oil exceeded the limits of legislative delegation of authority. That issue has already been decided. In Consumers Union of United States, Inc. v. Sawhill, 512 F.2d 1112 (Emer. Ct. App. 1975), the Federal Energy Administration's [FEA]

regulation setting a ceiling on prices for "old" crude and "released" crude through the 212.74(b) formula was upheld and the regulation that permitted "new" crude to be sold at the free market price was held to be invalid. A rehearing en blanc was granted and a closely divided court partially reversed itself by holding that the regulatory scheme that allowed "released" oil and "new" oil to be sold at the free market price was valid. Consumers Union of the United States, Inc. v. Sawhill, 525 F.2d 1068 (Emer. Ct. App. 1975).

The defendants' initial argument was that they were entitled to a continued supply of crude oil at the December 1, 1973, level and at the frozen "old" oil price. The defendants have modified that contention and now laternatively argue that the price should be determined by

applying the pricing formula found in 39 F.R. 1924 [212.74(b)] (January 15, 1974).[1] The formula allows "base production control level" crude oil to be sold at a price higher than the freeze

1. (b) Released crude. Notwithstanding paragraph (a) of this section, if this section, if during a particular month new crude petroleum which could be sold at other then the ceiling price pursuant to paragraph (a) of this section is produced from a property, the entire base production control level crude petroleum for that month may be sold at a price which exceeds the ceiling price: Provided, That the maximun price charged per barrel of that base production control level crude petroleum does not exceed the lesser of (1) the current free market price for the particular quality or grade of crude petroleum or (2) the price derived pursuant to the following:

$$P_{max} = P_c + \left[\left(\frac{C_{pr}}{C_{bpcl}} - 1\right)\right]\left(P_m - P_c\right)$$

Where:

P_{max} = Maximum price that may be charged for the crude petroleum (other new crude) purchased from the property (dollars per barrel);

P_c = Ceiling price of the crude petroleum (dollars per barrel);

price for "old" oil. The formula prices "old" oil at the frozen maximum price and includes a proportionate share of "released" oil at the free market price. The court feels that this argument has substantial merit.

The plaintiff has referred the court to an FEA ruling that partially explains 212.74:

> The formula of 212.74(b) was intended to spread the increased price of this amount of crude oil equivalent to the amount of "new" oil, which is permitted to be sold at free market prices, across the entire volume of base production control level crude oil sold during the month. It

(1. Cont.)

C_{bpcl} = Base production control level for property (barrels);

C_{pr} = Total amount of crude petroleum produced from the property during the month (barrels); and

P_{m} = Current free market price of the particular quality and grade of of crude petroleum (dollars per barrel).

> was not intended to permit all base production control level crude oil to be sold at free market prices.

FEA Ruling 1974-11, 10 C.F.R. 269-70 (1975). That ruling does not appear to directly apply to the case before this court because the hypothesis upon which it was based did not involve a December 1, 1973, purchaser but, rather, involved a new purchaser who desired to purchase all of the output, including "old", "new", and "released" oil. Furthermore, the above quoted passage does not necessarily contradict this court's view of the regulations. The ruling states that an "amount of crude oil equivalent to the amount of 'new' oil" will be sold at the free market price and spread across the volume of "base production control level crude oil." The formula does not include "new" oil. It does, however, include

"released" oil in an amount "equivalent to the amount of 'new' oil." It appears that the ruling was referring to "base production control level" oil which is composed of "old" and "released" oil. The statement in 10 C.F.R. 211.64(b) that new crude petroleum could be sold to anyone and the purchaser would not obtain a right of refusal until he actually purchased "new" oil adds additional weight to the court's interpretation. For practical purposes, the amount of "released" oil from a given field is equal to the amount of "new" oil and that appears to be the amount that the formula spreads over the total base production at free market prices.

The formula pricing provision was deleted from the regulations after the plaintiff terminated Johnson Oil. The fact remains, however, that this court

must interpret the regulations as they existed during the early months of 1974. As such, the court's decision may have absolutely no relationship to the regulations as they currently exist.

One of the main purposes of the "released oil" regulation was to increase domestic oil production. That purpose could be partially defeated by an order that the plaintiff must sell Johnson Oil a specified quantity of oil per month at the frozen price regardless of the available "old" supply. The "December 1" regulation freezes relationships to protect small refiners such as Johnson Oil. The two tier pricing regulations and the "December 1" regulation should be construed in such a way as to fulfill the purposes of each without harming the goals of the other regulations. Considering all of the regulations together, it appears that the

price regulations and the quantity or relationship regulations do work together. Johnson Oil was receiving no new oil on December 1, 1973. As such, from that point on, while the "December 1" regulation is in operation and not changed by other regulations, Johnson Oil has a right to receive 125 barrels of "base production control level" crude oil per day from the plaintiff so long as there is no overall shortage and all other requirements are met. It appears that the "formula" price was the proper price while the formula was in existence. The court does not comment on what the price should be for oil purchased today under the changed regulations. In its research, the court has noticed that in several particulars the regulations have changed substantially since the early months of 1974. For example, the "entitlements program" was

initiated after the plaintiff terminated Johnson Oil. 10 C.F.R. 211.67 (1975). Changes such as that could substantially affect the court's interpretation of the "December 1" regulation for prospective application. See Pasco, Inc. v. Federal Energy Administration, 525 F.2d 1391 (Em. Ct. App. 1975). Those changes were not, however, argued or briefed for the court's current deliberations.

Wrongful Termination of Contract

Since both parties were working with new regulations and had little information to guide them, except for the issue on punitive damages, the court believes that they were acting in good faith concerning any errors in interpretation they may have made. Neither side was completely correct in its position. The court will not now specify any relief but simply notes that it believes the law requires Mountain Fuel

and Johnson Oil to be restored to an equitable position under their contract.

Punitive Damages

The court feels under the present factual posture defendants' claim for punitive damages may not be eliminated by a motion for summary judgment.

Condensate

In its original motion for summary judgment, the plaintiff raised an issue concerning condensate taken by Johnson Oil. The court believes there is reason to support the claim that any condensate taken from areas where there was no "old" production could be charged at the contract price of "Amoco posting plus $.05." Since the original arguments the parties have ignored the issue.

Consequently, the court will not now finally rule upon it.

IT IS HEREBY ORDERED that the proper "posted price" for crude oil for the Dry Piney field on May 15, 1973, is "Amoco posting plus $.03."

IT IS FURTHER ORDERED that Johnson Oil is entitled to receive 125 barrels of base production control level crude oil per day from the plaintiff while the "December 1" regulation is unaltered and in effect and so long as there is no overall shortage of production and other regulatory and contractual requirements are met by Johnson Oil. The price for the oil actually received by Johnson Oil during 1974 should be the previously discussed "formula" price.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment will not be granted on the defendants' counterclaim for punitive damages.

Dated this 26th day of May, 1976.

ALDON J. ANDERSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH NORTHERN DIVISION

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation,	)	
Plaintiff,	)	ORDER SUPPLEMENTING ORDER OF MAY 28, 1976
vs.	)	NC 75-3
RELAND JOHNSON and JOHNSON OIL COMPANY, INC.,	)	
Defendants.	)	

On May 26, 1976, the court signed an "Order Determining Questions of Law" and filed the order on May 28, 1976. Since that time the court has been informed that counsel interpret the order differently concerning the issue of whether the plaintiff wrongfully terminated the contract with Johnson Oil. This order is being entered to resolve that dispute.

The plaintiff wrongfully established the "Cowboy" price as the "posted price" and demanded that Johnson Oil pay for "new" as well as "old" and "released" oil. The defendants wrongfully refused to pay a price above the frozen "old oil" price for any of the oil they received in 1974 and refused to pay the $1.00 per barrel authorized price increase in December of 1973. On page 9 of the May 28, 1976, order the court discussed the wrongful termination of contract issue. The court pointed out:

> Neither side was completely correct in its position. The court will not now specify any relief but simply notes that it believes that the law requires Mountain Fuel and Johnson Oil to be restored to an equitable position under their contract.

It was the intention of the court to reserve the issue of wrongful termination of contract for determination at the trial. The court did not specify any

relief for the period during which Johnson Oil received no oil or condensate from the plaintiff. The award of such relief, if any, should be specified after the wrongful termination issue is decided at the trial.

IT IS HEREBY ORDERED that the wrongful termination of contract issue will be decided at the trial.

DATED this 2nd day of June, 1976.

ALDON J. ANDERSON
United States District Judge

AFFIDAVIT OF SERVICE

I, Kathy Pickett, depose and say that I am a secretary in the office of Dan S. Bushnell and Joseph C. Rust, and that on March 17, 1979, pursuant to Rule 33, Rule of Supreme Court, I served three copies by mail of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, on each of the parties required to be served herein, as follows:

Robert S. Campbell
Duane R. Smith
Watkiss & Campbell
310 South Main #1200
Salt Lake City, Utah 84101

Kathy Pickett

In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1431

JOHNSON OIL COMPANY, INC.,

Petitioner

v.

MOUNTAIN FUEL SUPPLY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF MOUNTAIN FUEL SUPPLY COMPANY IN OPPOSITION

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310 South Main Street
12th Floor
Salt Lake City, Utah 84101
Counsel for Mountain Fuel Supply Company, Respondent

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF MOUNTAIN FUEL SUPPLY COMPANY IN OPPOSITION

The Respondent, Mountain Fuel Supply Company (hereafter MOUNTAIN FUEL) respectfully submits this Brief pursuant to Rule 24 of the Rules of Practice of this Honorable Court and urges that this Court deny the Petition for Writ of Certiorari of Johnson Oil Company (hereafter JOHNSON OIL) which seeks review of the Opinion of the Court

of Appeals for the Tenth Circuit in Case Nos. 77-1410 and 77-1432 reported at 586 F.2d 1375 (10 Cir. 1978).

JURISDICTIONAL BASIS OF JOHNSON OIL PETITION FOR CERTIORARI

JOHNSON OIL rests its Petition for Certiorari herein upon the omnibus Certiorari Statute, 28 U.S.C. 1254(1). The Tenth Circuit issued its opinion in the Case on November 22, 1978 dismissing both the appeal of JOHNSON OIL and the cross-appeal of MOUNTAIN FUEL. On December 20, 1978, the Tenth Circuit denied Petitions for Rehearing filed by both parties to the litigation. The Petition of JOHNSON OIL is improvidently laid under the Staute and does not meet the foundation and fundamental prerequisites with respect to granting Certiorari review by this Court pursuant to Rule 19 of the Rules of Practice and of the law of the case.

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS RAISED BY JOHNSON OIL

JOHNSON OIL does not urge that its Petition for Certiorari is bottomed on the contradiction of any constitutional right. Rather, it fastens its claim for certiorari review to certain sections of the Economic Stabilization Act of 1970 and the Emergency Petroleum Allocation Act of 1973.
They are:

15 U.S.C. §754(a)(1) of the Emergency Petroleum Allocation Act.

Sections 205-207 and 209-211 of the Economic Stabilization Act as incorporated by reference within 15 U.S.C. §754(a)(1).

12 U.S.C. §1904 Note, the 1970 Emergency Stabilization Act.

QUESTIONS PRESENTED FOR REVIEW

1. Is JOHNSON OIL entitled to pursue its Petition for Certiorari herein when MOUNTAIN FUEL has, subsequent to the mandate of the Tenth Circuit being entered in the District Court, made full payment and satisfaction of Judgment with the Registry of the Court and JOHNSON OIL has voluntarily withdrawn and recovered said funds in satisfaction of the judgment?

2. Is certiorari review jurisdiction available to JOHNSON OIL with respect to the decision of the Tenth Circuit Court of Appeals which is not in conflict with any decision of the Temporary Emergency Court of Appeals or of the Supreme Court?

3. Is certiorari review jurisdiction available to JOHNSON OIL with respect to a question which, under the attendant facts, is insubstantial?

4. Is there a direct and inexorable nexus between the appeal of JOHNSON OIL for punitive damages against MOUNTAIN FUEL and the TECA issues that MOUNTAIN FUEL violated the express provisions of the 1973 Emergency Petroleum Allocation Act or the pricing provisions of the 1970 Economic Stabilization Act?

5. If this Court were to grant a Writ of Certiorari based on the Petition of JOHNSON OIL, should the Court take and hear the full case, including the cross-appeal of MOUNTAIN FUEL before the Tenth Circuit?

STATEMENT OF THE CASE

While the Petition of JOHNSON OIL herein is correct in some parts, it falls quite short of a complete accounting of the facts of the matter necessary to a full assessment by this Court of the Certiorari Petition, including the crucial questions of subject matter jurisdiction as analyzed by the Tenth Circuit.

As a result of this deficiency of JOHNSON OIL, MOUNTAIN FUEL sets out, in capsule form, its own Statement of the Case:

1. MOUNTAIN FUEL filed an action against JOHNSON OIL in the State Court for Utah in June of 1974 wherein judgment was sought for crude oil deliveries sold from MOUNTAIN FUEL's Dry Piney Field. While the MOUNTAIN FUEL action was founded on breach of contract and for monies due and owing, the quantum of recovery was founded upon the regulations of the Cost of Living Council and the Economic Stabilization Act of 1970 (hereafter "ESA"), 12 U.S.C. §1904 Note.

2. JOHNSON OIL initially filed an Answer and Counterclaim in State Court against MOUNTAIN FUEL, later amended, which challenged the constitutional validity of the Emergency Petroleum Allocation Act, (hereafter sometimes referred to as "EPAA" or "Allocation Act"), 15 U.S.C. §751 and the regulations promulgated thereunder. The counterclaim, as well, sought the recovery of civil penalties for claimed overcharges in the sale of Dry Piney crude oil by MOUNTAIN FUEL, which were also alleged to have been made in violation of the Allocation Act.

3. On January 6, 1975, JOHNSON OIL filed a Petition for Removal of the case from the State District Court of Utah to the U.S. District Court for Utah, Central Division, urging, *inter alia*, (i) breach of contract by MOUNTAIN FUEL for failure to make crude oil deliveries to JOHNSON OIL under the Allocation Act, (ii) wrongful interference with a business relationship, (iii) alleged violations of the so-called "freeze" regulations of the Federal Energy Office promulgated under the 1973 Allocation Act with respect to the producer-purchaser relationship, (iv) that sales of "new" and "released" oil to JOHNSON OIL were made at a claimed "illegal" price contrary to the Allocation Act, and (v) civil penalties and treble damages under the ESA as the same are incorporated within the EPAA.

4. Once the case was removed to the Federal side, JOHNSON OIL again amended its Counterclaim to seek *punitive damages* against MOUNTAIN FUEL for the violation of the government "freeze order" in terminating sales of crude oil, for willful breach of contract, and for improper and illegal charges and prices by MOUNTAIN FUEL of crude oil sales to JOHNSON OIL, all in claimed violation of the EPAA and the ESA.

5. By interlocutory Order dated May 26, 1976, the trial Court determined that the authorized and highest posted price under the 1973 Allocation Act (which incorporates the ceiling price provisions of the ESA) was higher, per barrel, than that argued by JOHNSON OIL but a lower per-barrel price than that charged by MOUNTAIN FUEL.

6. In June of 1976, the case was set down for trial by jury on the following questions of fact:

(i) Was JOHNSON OIL in breach of its contract with MOUNTAIN FUEL for failure to pay for crude oil purchases? JOHNSON OIL stipulated at the outset of trial that it owed MOUNTAIN FUEL the sum of $19,-628.50 for crude oil sold and delivered by MOUNTAIN FUEL, the price of said oil being based upon the regulations of the Cost of Living Council under the ESA.

(ii) Was MOUNTAIN FUEL entitled to terminate its contract with JOHNSON OIL for the failure of the latter to pay for the quantity of crude oil sold by MOUNTAIN FUEL at prices MOUNTAIN FUEL determined to be due under the ESA?

(iii) Did MOUNTAIN FUEL wrongfully interfere with the alleged business relationship between JOHNSON OIL and a third party corporation, Allied Chemical? Such issue implicity raised the Allocation Act and regulations thereunder.

(iv) Was JOHNSON OIL entitled to exemplary damages against MOUNTAIN FUEL for what was alleged to be reckless, intentional and wanton disregard for the contractual rights of JOHNSON OIL to receive Dry Piney crude oil pursuant to the Allocation Act and at a price in accordance with Johnson's interpretation of the regulations promulgated under the ESA?

7. The trial Court reserved for post-trial adjudication the claims of JOHNSON OIL with respect to the recovery of civil penalties, statutory overcharges, treble damages and attorneys' fees as provided by the ESA.

8. At the trial of the Case, JOHNSON OIL argued that the foundational basis for its claim of punitive damages against MOUNTAIN FUEL was the "illegal" prices charged by MOUNTAIN FUEL under the ESA and the intentional violation by MOUNTAIN FUEL of the Allocation Act which allegedly "froze" the relationship between producer and buyer. JOHNSON OIL also argued that it was entitled to exemplary damages for selling "new" and "released" oil when JOHNSON OIL was entitled under the ESA and the EPAA to the "old" oil price.

9. On the issues made the subject of trial by jury, a general verdict was returned in favor of JOHNSON OIL in the sum of $65,000.00 compensatory damages and $110,000.00 punitive damages. The trial Court, on a Motion for Directed Verdict filed by MOUNTAIN FUEL, concluded that the punitive damage award to JOHNSON OIL could not stand under the evidence, as to either the counts of breach of contract or business interference and accordingly, the directed verdict Motion was granted and the punitive damage award of $110,000.00 was set aside and struck from the ultimate Judgment.

10. The trial Court thereafter determined that JOHNSON OIL was unentitled to recover treble damages, civil penalties or attorneys' fees and costs under the ESA by Order dated December 23, 1976. A final Judgment on all issues in the litigation was entered by the District Court on May 2, 1977.

11. Exactly one day after the entry of the final Judgment of the trial Court on May 2, 1977, JOHNSON OIL filed its Notice of Appeal with the Tenth Circuit Court of

Appeals. It raised in that appeal all of the questions as to which it had taken an adverse ruling under the ESA and the EPAA. Included therein was the claimed entitlement of JOHNSON OIL to punitive damages, civil penalties, treble damages, attorneys' fees and costs. The claim of JOHNSON OIL for punitive damages, as well as the punitive damage defenses of MOUNTAIN FUEL, were inextricably connected to a judicial review of the administrative regulations under the ESA and the Allocation Act of 1973, having a nexus to the federal pricing and allocations policies on crude oil.

12. MOUNTAIN FUEL filed a cross-appeal before the Tenth Circuit with respect to evidentiary rulings surrounding the award of compensatory damages for breach of contract and as well, for what MOUNTAIN FUEL urged to be an erroneous interpretation of the crude oil regulations with respect to the highest posted price in the Dry Piney Field. By reason of Rule 34(d) Federal Rules of Appellate Procedure, MOUNTAIN FUEL, although the Appellee and Cross-Appellant before the Tenth Circuit, became and was treated as the Appellant.

13. JOHNSON OIL did not at any time attempt to undertake an appeal of the final Judgment of the District Court to the Temporary Emergency Court of Appeals (hereafter TECA) with respect to punitive damages or any other issue of crude oil pricing or allocation that had an inexorable relationship to the ESA of 1970 or the Allocation Act of 1973 and the regulations promulgated thereunder.

14. *Jurisdiction.*

During the briefing phase of the appeals, the Tenth

Circuit requested that the parties address the question of the subject matter jurisdiction of the Tenth Circuit to entertain the JOHNSON OIL appeal and/or the MOUNTAIN FUEL cross-appeal. MOUNTAIN FUEL submitted its position on subject matter jurisdiction in its Opening Brief. MOUNTAIN FUEL argued, on the one hand, that the initial Complaint filed in State District Court did not "arise under" the EPAA of 1973, for the MOUNTAIN FUEL cause of action was one for the payment of crude oil sold and delivered and thus, for breach of contract. On the other hand, federal subject matter jurisdiction, it was contended, was extant under section 211 of the ESA, as incorporated by reference into the EPAA under the Answer and Counterclaim of JOHNSON OIL.[1] MOUNTAIN FUEL maintained that in all events, the Tenth Circuit maintained jurisdiction over the non-TECA questions. Pages 19-25 of the MOUNTAIN FUEL Opening Brief to the Tenth Circuit are attached hereto as Appendix 1. JOHNSON OIL concurred with and did not add anything to the MOUNTAIN FUEL statement on subject matter jurisdiction in its Opening Brief.

Upon oral argument of the appeals in September of 1978 (a predominant portion of which was directed to the issue of subject matter jurisdiction of the Tenth Circuit *vis-a-vis* TECA), the Tenth Circuit issued its opinion on November 22, 1978 dismissing both the appeal of JOHNSON OIL and the cross-appeal of MOUNTAIN FUEL for lack of subject

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[1] Under section 211 of the ESA, a case is subject to removal from a state court to federal district court at any time by any party when the constitutionality of the statute or the validity of any agency action (regulation) is called into question under the ESA or the EPAA. Such issue could be raised by complaint, answer, counterclaim or other pleading. Section 211, Economic Stabilization Act.

matter jurisdiction.[2] The Tenth Circuit determined that all issues, *including the punitive damage question raised by JOHNSON OIL*, in the case were TECA-related and that the exclusivity of TECA statutory jurisdiction foreclosed appellate review by the Tenth Circuit.

Both parties filed Petitions for Rehearing. MOUNTAIN FUEL urged that the evidentiary rulings of the trial Court with respect to the breach of contract question and the inconsistency of the trial Court in submitting the tortious business interference claim to the jury while at the same time granting MOUNTAIN FUEL's Motion for a Directed Verdict on punitive damages, were unequivocally non-TECA questions having no relationship to the ESA or the EPAA. JOHNSON OIL, in its Petition, urged that the punitive damage issue was of a non-TECA character and that the Tenth Circuit should proceed to hear the same; on the other hand, MOUNTAIN FUEL contended that the punitive damage question was plainly an outgrowth of claims made by JOHNSON against MOUNTAIN FUEL for alleged violations of the ESA and the EPAA, and was therefore clearly an issue for TECA.

15. On December 20, 1978, the Tenth Circuit denied Petitions for Rehearing of both JOHNSON OIL and MOUNTAIN FUEL.

16. The entitlement of JOHNSON OIL to any compensatory damage or judgment for breach of contract was sharply contested by MOUNTAIN FUEL on evidentiary and

[2] **A conformed copy of the November 22, 1978 Opinion of the Tenth Circuit is attached to the Petition for Certiorari of Johnson Oil pp. 29-65 inclusive.**

legal bases before the trial Court and on appeal to the Tenth Circuit. (Better than 60% of MOUNTAIN FUEL's 74-page Brief to the Circuit was directed to the compensatory damage issue.) Nonetheless, in order to compromise, resolve and put an end to the litigation, upon the mandate in the case being entered in the District Court, MOUNTAIN FUEL, on January 3, 1979, tendered into the Registry of the Court the sum of $47,393.24 to JOHNSON OIL in full payment and satisfaction of the Judgment of May 2, 1977 of the District Court.[3] (See Appendix 2.) Thirteen days later on January 16, 1979, JOHNSON OIL asked the District Court for permission to withdraw the monies from the Registry of the Court and at the same time to reserve any right that it may have as to any other portion of its counterclaim. Upon oral argument, Chief U.S. District Judge Aldon J. Anderson denied the JOHNSON OIL Motion without prejudice to bring the same before the Senior Judge, William G. Juergens, specially assigned to the case. No such Motion was ever brought before Judge Juergens, even though Chief Judge Anderson ordered that it would be procedurally appropriate to so do. (See Appendix 3.)

17. Without notice or motion, JOHNSON OIL, on February 5, 1979, withdrew from the Registry of the District Court the MOUNTAIN FUEL tender and accepted the $47,393.24 in full payment and satisfaction of the May 2, 1977 final Judgment of the District Court. While acknowledging

[3] **Said tender took into account as an offset against the compensatory damage award of $65,000.00 in favor of Johnson Oil, the stipulated judgment in favor of Mountain Fuel, together with interest, for crude oil sold and delivered in the sum of $23,203.99. The net tender and satisfaction of judgment was the sum of $47,393.24.**

full payment and satisfaction of said Judgment, JOHNSON OIL attempted to reserve any right of appeal it otherwise had "on any portion of its counterclaim". (See Appendix 4.)

POINT I

THE CERTIORARI PETITION OF JOHNSON OIL IS IMPROVIDENT AND SHOULD BE DENIED, FOR JOHNSON OIL BY ACCEPTING PAYMENT AND SATISFYING THE JUDGMENT BELOW, HAS WAIVED ANY RIGHT TO REQUEST CERTIORARI REVIEW BY THIS COURT

1. *Johnson Oil Does Not Have Standing to Petition for Certiorari.*

At the threshold of any case brought to this Honorable Court via certiorari procedure under 28 U.S.C. §2101(c), is the standing of the Petitioner to request the issuance of the Writ. *Warth v. Seldin*, 422 U.S. 490, 45 L.Ed. 2d 343, 95 S.Ct. 2197 (1975). Indeed, the Rules of Practice of this Court, Rule 19 *et seq.*, are implicit that a *sine qua non* of certiorari jurisdiction is that the petitioner be clothed with standing to present the case. If the case is at an end or has become moot by action in the lower Court, or if the cause is no longer justiciable by reason of the lack of standing of the petitioner, certiorari will be denied. *North Carolina v. Rice*, 404 U.S. 244, 30 L.Ed. 2d 418, 92 S.Ct. 402 (1971); *Sears Roebuck & Co. v. Carpet, Linoleum, Soft Tile & Resilient Floor Covering Layers, et al.*, 397 U.S. 655, 25 L.Ed. 2d 637, 90 S.Ct. 1299 (1970).

Under the extant facts of this Case, the justiciable issues of the controversy have been put to rest and are not open to review. Those facts plainly are that on January 3, 1979, MOUNTAIN FUEL paid the final Judgment of the District Court in the sum of $47,393.24, a Judgment which at the time was keenly disputed. The payment by MOUNTAIN FUEL was made to bring an end to the litigation and hence tender was in "full payment and satisfaction" of the Judgment, inclusive of each and every part thereof. (See Appendix 2.) JOHNSON OIL recovered and accepted MOUNTAIN FUEL's tender in full payment and satisfaction of the Judgment and acknowledged full satisfaction of said Judgment on February 5, 1979. (See Appendix 4.) Such acceptance and acknowledgment stripped JOHNSON OIL of the standing to undertake a Petition for Certiorari to this Court from the very Judgment which it acknowledges to have been satisfied.

2. *The General Rule on Standing and Waiver.*

The controlling precept of law is to the effect that a party cannot accept the benefits or fruits of a non-severable judgment and at the same moment, appeal the specific aspects of the same judgment which cuts against the party. The various Circuit Courts of Appeal have long recognized the proposition. *Smith v. Morris, et al.*, 69 F.2d 3 (CCA 3rd 1934); *Kaiser v. Standard Oil Co. of N.J.*, 89 F.2d 58 (CCA 5th 1937); *Colquette v. Crossett Lumber Co.*, 149 F.2d 116 (CCA 8th 1945); *Luther, et al. v. United States*, 225 F.2d 495 (CCA 10th 1955); *Wilson v. The Pantasote Company*, 254 F.2d 700 (2 Cir. 1958).

As stated by the Tenth Circuit in *Luther*:

"* * * It is a well established general rule of solid

> foundation that a litigant who accepts all or any substantial part of the benefits of a judgment or decree is precluded from asking that such judgment or decree be reviewed on appeal. He cannot avail himself of its advantages and then challenge its disadvantages on appeal. After accepting all or any substantial part of its benefits, he cannot escape its burdens. * * *" (Citations omitted.)

There appears to be two possible exceptions to the general rule that a party may not pocket the monies from a judgment on the one hand, and simultaneously launch an appeal from that judgment on the other hand. The first is that if the judgment is severable or divisible into independent parts, satisfaction of one part of the judgment is not a bar to an appeal of a separate and severable issue. *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1978). The second possible exception was suggested by this Court in *United States v. E. B. Hougham, et al.*, 364 U.S. 310, 5 L.Ed. 2d 8, 81 S.Ct. 13 (1960) wherein it was held that in an appeal from a damage award claimed to be inadequate, the acceptance of payment of the compensatory judgment does not, standing alone, amount to a waiver or an accord and satisfaction. The decision in *Hougham* carries with it a strongly-worded dissent by Justices Whittaker and Douglas and at least one treatise writer questions the breadth or reach of the holding. See *Moores Federal Practice*, Vol. 9 ¶203.07 at p. 718.[4]

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[4] **Moore would restrict the opinion in Hougham to the four corners of the facts before the Court therein, characterizing it as a "guarded" opinion:**

> **" * * * Furthermore, the judgment debtor's argument that his payment was offered and accepted as an accord and satisfaction was made untenable by the fact that he himself took the initial appeal from the judgment." 9 Moores Federal Practice at p. 718. (Emphasis added.)**

It is patently clear that the facts of this Case fall unmistakably within the framework of the general rule announced time and again by a legion of federal circuit decisions which have never been overturned. Those facts are that the compensatory damage judgment is an integral facet of the claim of JOHNSON OIL to punitive damages under its Petition for Certiorari herein. But for the compensatory damage judgment, the exemplary damage claim could not stand as a matter of law, regardless of the facts *Maw v. Weber Basin Water Conservancy District*, 20 U.2d 195, 436 P.2d 230 (1968). Ergo, the conclusion is inescapable that the determination of the punitive damage claim was a non-severable or indivisible part of the judgment as to compensatory damages. The punitive damage claim and the compensatory damage claim, while separate causes of action, were non-severable in law, for they were non-severable in fact under the evidence at trial.

It turns out, however, that the compensatory damage judgment was one that was hotly contested and disputed by MOUNTAIN FUEL. Such judgment was made the subject of a cross-appeal by MOUNTAIN FUEL before the Tenth Circuit. When the Circuit dismissed MOUNTAIN FUEL's cross-appeal of the compensatory judgment as well as the direct appeal of JOHNSON OIL on punitive damages, MOUNTAIN FUEL, in order to compromise and resolve a disputed judgment, paid the same, less its offset judgment against JOHNSON OIL, on January 3, 1979. *At no time did MOUNTAIN FUEL acknowledge that the compensatory damage judgment in favor of JOHNSON OIL was, in fact or law, due and owing.*

Thirteen days later, on January 16, JOHNSON OIL filed a Motion before the District Court to permit acceptance of the tender without prejudicing any appellate claims it may have had. Upon hearing, Chief United States District Judge Aldon J. Anderson *denied* the JOHNSON OIL Motion, finding that it had been brought before the wrong judge and that such Motion should be submitted to Senior Judge William G. Juergens, to whom the Case was originally assigned.

But JOHNSON OIL did not take such steps. Rather, it withdrew from the Registry of the Court on February 5, 1979, the draft of $47,393.24 which had been expressly tendered by MOUNTAIN FUEL in full payment and satisfaction of the final Judgment. Although it tried to hedge against the plain implications of an accord and satisfaction and waiver of appeal (including Certiorari to this Court) with the statement that such "acceptance" was not meant to limit its right of appeal on any portion of its counterclaim, *the fact is that JOHNSON OIL did just that.* It recovered the monies, acknowledged satisfaction of the compensatory judgment that was otherwise fervidly contested by MOUNTAIN FUEL and in so doing, accepted the terms of the MOUNTAIN FUEL tender, namely, the satisfaction of judgment and the termination of the litigation on any damage issue whatsoever.

Nor do the facts of this matter fit within the possible exception of *Hougham*. To begin with, in *Hougham* the respondents, themselves, had undertaken the initial appeal, thus expressly negating a finding of accord and satisfaction. Such conduct is the antithesis of MOUNTAIN FUEL's conduct in the Case at Bar. But more to the point, JOHNSON OIL makes no claim in its Petition for Certiorari that the

compensatory damage award or judgment, itself, is inadequate. Indeed, that conclusion is explicit, for JOHNSON OIL did not undertake any appeal to the Tenth Circuit of the compensatory damage judgment, much less incorporate it within the Petition for Certiorari herein. Thus it is that JOHNSON OIL does not seek a higher compensatory damage award as did the Government in *Hougham*. It seeks an award of punitive damages which, while inseparable from the final Judgment on compensatory damages, is not an add-on for further compensatory damages.

3. *Conclusion on Standing.*

JOHNSON OIL is without standing before this Court on the Petition for Certiorari filed. The Judgment of the lower Court was paid by MOUNTAIN FUEL in compromise of and to end the litigation on damage issues. JOHNSON OIL accepted the conditional tender, and acknowledged full satisfaction of the Judgment. Under the exigent facts, the litigation with respect to damages, inclusive of the adjunct issue of punitive damages, is at an end. To find otherwise would be to permit a party to pocket a money judgment which is in dispute and at the same time to appeal that judgment.

POINT II

THERE IS NO CONFLICT, MUCH LESS SUBSTANTIAL OR IRRECONCILABLE DISPARITY, BETWEEN THE DECISION OF THE TENTH CIRCUIT AND TECA

1. *The Basis for Certiorari is Absent.*

Rule 19(b) of the Supreme Court Rules of Practice is the cornerstone upon which the Petition for Certiorari of

JOHNSON OIL must rest. The Rule is unequivocal that in order for a Certiorari Writ to issue to the Tenth Circuit in the instant Case, the Circuit decision must collide with that of TECA on the same matter, or the holding of the Tenth Circuit must stand in opposition to a decision of this Court. The asserted conflict between the Circuit decision and that of TECA requires a finding of square and irreconcilable contradiction in the application of federal law. *Avco Corporation v. Aero Lodge,* 390 U.S. 557, 20 L.Ed. 2d 126, 88 S.Ct. 1235 (1968); *Northeastern National Bank v. United States,* 387 U.S. 213, 18 L.Ed. 2d 726, 87 S.Ct. 1573 (1967). Conflicts between a Circuit and TECA which are only apparent or superficial and which require invented argument to establish the same, will normally result in a denial of Certiorari. *Keller v. Adam-Campbell Co.,* 264 U.S. 314, 68 L.Ed. 705, 44 S.Ct. 356 (1924); *Wisconsin Electric Co. v. Dunmore Co.,* 282 U.S. 813, 75 L.Ed. 728, 51 S.Ct. 214 (1931).

Even assuming, arguendo, the assistance of a square and irreconcilable conflict (not extant in this Case) between the decisions of the Circuit and TECA, the issue, to justify Certiorari must be one of substantial importance, having a significant bearing on the body of federal jurisprudence and persons affected thereby, and/or be of a recurring nature in the cases and controversies. *Lay v. Williams,* 434 U.S. 910, 54 L.Ed. 2d 196, 98 S.Ct. 311 (1977); *Aldinger v. Howard,* 427 U.S. 1, 49 L.Ed. 2d 276, 96 S.Ct. 2413 (1976); *Fuller v. State of Oregon,* 417 U.S. 40, 40 L.Ed. 2d 643, 94 S.Ct. 2116 (1974).

Lastly, the law is squarely settled that in order for the case to be worthy of Certiorari by reason of a conflict of a

Circuit holding with a decision of this Court, that conflict must be of the most direct, substantial and unequivocal character. *Wilkinson v. United States,* 365 U.S. 399, 5 L.Ed. 2d 633, 81 S.Ct. 567 (1961); *Anderson v. Kibbe,* 431 U.S. 145, 52 L.Ed. 2d 203, 97 S.Ct. 1730 (1977).

An evenhanded analysis of the Petition for Certiorari of JOHNSON OIL herein yields the unavoidable conclusion that the decision of the Tenth Circuit with respect to its review of the punitive damage issue raised by JOHNSON OIL is in harmony, not disharmony, with the holdings of TECA as to appellate jurisdiction involving issues under the ESA and the EPAA. On top of that, the holding of the Circuit in this matter is palpably distinguished from the decision of the Supreme Court in *Bray v. United States,* 423 U.S. 73, 46 L.Ed. 2d 215, 96 S.Ct. 307 (1975). Accordingly, Certiorari is not providently laid in this case.

2. *The Position of JOHNSON OIL on Conflict of Circuit and TECA Decisions.*

Taken at its very best, the argument of JOHNSON OIL, in its Petition for Certiorari is that its appeal to the Tenth Circuit, with respect to the directed verdict of the District Court against JOHNSON OIL on entitlement to punitive damages, was and is a non-TECA issue that otherwise was within the general appellate jurisdiction of the Circuit; the argument continues that the Tenth Circuit improperly dismissed the JOHNSON OIL appeal as to punitive damages, because the question was swept out with TECA issues which the Tenth Circuit refused to hear; it is then contended that if the punitive damage issue had been appealed by JOHNSON

OIL in the first instance to TECA rather than the Tenth Circuit, TECA, based upon the case precedent of *Cooper,*[5] *Spinetti,*[6] and its progeny, would have likewise dismissed the issue for lack of subject matter jurisdiction on the basis that TECA is jurisdictionally precluded from hearing non-ESA and non-EPAA questions; the JOHNSON OIL argument concludes on the note that in light of the foregoing, the decision of the Tenth Circuit dismissing the JOHNSON OIL appeal herein (which incorporated what JOHNSON claims to be the non-TECA issue of punitive damages) is in conflict with the decisions of TECA in *Cooper* and *Spinetti, et al.,* and that this Court should take the case on Certiorari to resolve the apparent conflict.

The entire fabric of the JOHNSON OIL position in its Certiorari Petition is wedded to the notion that the question of punitive damages in the instant litigation is a federal common law issue with the general appellate jurisdiction of the Tenth Circuit and that it has no nexus to any TECA issue under the ambit of the ESA or the Allocation Act. It is altogether clear that if the contrary proposition is correct and that the question of punitive damages in this Case requires the interpretation of statute and/or regulation of the ESA and the Allocation Act as the Tenth Circuit so determined, the entire Petition of JOHNSON OIL falls of its own weight, notwithstanding the argument made in Point I of this Brief.

3. *The Issue of Punitive Damages Raised by JOHNSON OIL on Appeal was Plainly a Question for TECA Under the Controlling Law.*

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[5] **United States v. Cooper, 482 F.2d 1393 (Em.App. 1973).**
[6] **Spinetti v. Atlantic Richfield Company, 522 F.2d 1401 (Em.App. 1975).**

A fair reading of the JOHNSON OIL Brief before the Tenth Circuit, as well as the decision of the Tenth Circuit, itself, places the matter beyond any reasonable debate that the question of whether there was sufficient evidence before the trial Court to sustain, as a matter of law, a finding of punitive damages in favor of JOHNSON OIL and against MOUNTAIN FUEL, was within the sole jurisdictional province of TECA and not the Tenth Circuit.

JOHNSON OIL is correct in its assertion, at page 22 of its Petition, that a substantial portion of its appeal to the Tenth Circuit was devoted to a discussion of the evidence which it claimed allegedly supported a reinstatement of the punitive damage award of the jury. The flaw in JOHNSON OIL's argument, however, is the very character and substance of that evidence which JOHNSON OIL argued to support the exemplary damage issue. Such argument was fundamentally directed to crude oil pricing and allocation practices of MOUNTAIN FUEL *vis-a-vis* JOHNSON OIL pursuant to federal regulations under the ESA and the Allocation Act. In the opening lines of the JOHNSON OIL Brief to the Circuit, the contention is that punitive damages were recoverable against MOUNTAIN FUEL because of a violation of such federal Statutes:

> "It is submitted that Mountain Fuel, by disregarding the *government freeze order, making illegal charges above the ceiling price, by disregarding the terms of the written contract with Johnson,* and by wrongfully and intentionally interfering with Johnson's contractual relationship with Allied Chemical establishes an aggravated case of wanton and oppressive conduct as defined by the court." Johnson Oil Opening Brief to Tenth Circuit p. 7. [Emphasis added.]

At page 10 through 21, inclusive, of its Circuit Brief, JOHNSON OIL urged that the "illegal overcharge" of MOUNTAIN FUEL for "new" and "released" oil as against "old" oil and the alleged overcharge of $.44 per barrel above the regulated posted price in the area were grounds for punitive damages. From pages 22 to 27 inclusive, JOHNSON OIL argued, as a basis for punitive damages, that "Mountain Fuel Ignored Governmental Freeze" under the Allocation Act of 1973 and promulgated regulations of the Federal Energy Office. JOHNSON OIL argued therein that it was not required under the regulations to take "new" or "released" oil as defined by the oil regulations, and therefore was entitled to receive "old" oil at the old oil price under the Allocation Act.

Throughout the Brief to the Tenth Circuit the JOHNSON OIL argument is fairly drenched with allegations that MOUNTAIN FUEL violated the government allocation order with respect to "new" and "released" oil, that it intentionally overcharged JOHNSON OIL contrary to agency regulations of the ESA, and that it illegally adopted a posted price for Dry Piney crude oil, all of which entitled it to punitive damages. All of the charges of JOHNSON OIL that MOUNTAIN FUEL violated the regulations of the ESA and the Allocation Act were vigorously opposed by MOUNTAIN FUEL. Such charges required interpretation of the administrative regulations by the appellate Court in light of the rulings of the District Court. To suggest that the JOHNSON OIL claim of punitive damages was not directly linked to alleged violations of the ESA and the Allocation Act would not only be inaccurate, it would be a fantasy.

The Tenth Circuit added its stamp of acknowlegement that the JOHNSON OIL Counterclaim, including the Amended Counterclaim for punitive damages, implicated federal laws and regulations under the ESA and the EPAA. Writing for the Court, Circuit Judge Barrett stated:

> "We have previously noted that the issues tried in this case were those framed by the Johnson Counterclaim. *The allegations set forth in that Counterclaim invoked and implicated United States laws under the ESA of 1970, 12 U.S.C.A. §1904 Note (Supp. 1977); the EPAA of 1973, 15 U.S.C.A. §§751, et seq., and the implementing regulations duly promulgated thereunder 6 CFR §150.353 (1974); 10 CFR §211.63 (a) (1977).* These regulations spell out the two-tier pricing system established in 1973 which provides that 'old oil' may not be sold above the lower tier ceiling price, 10 CFR §212.72 (1977) and that 'new oil' may not be sold above the upper tier ceiling price, 10 CFR §212.74 (1977). *Allegations against Mountain Fuel involve its alleged disregard of the government 'freeze order,' making 'illegal' charges above the 'ceiling prices,' and requiring Johnson to purchase 'old,' 'released' and 'new' oil at illegal prices contrary to government regulations.*" 586 F.2d at 1384. [Emphasis added.]

The Tenth Circuit went on to state that any claim by JOHNSON OIL that any strict "contract law allegations" made by JOHNSON OIL against MOUNTAIN FUEL *were inseparable* from the federal acts and regulations cited above and that JOHNSON OIL so acknowledged the same to the Circuit in its appellate brief. The Circuit concluded with the affirmative statement that:

> "We hold that this court is without jurisdiction to entertain this appeal. In our view, exclusive jurisdic-

tion vests in the TECA by virtue of 28 U.S.C.A. §1331 (Supp. 1977); 15 U.S.C.A. §754(a)(1), which incorporates §211 of the ES Aof 1970, 12 U.S.C.A. corporates §211 of the ESA of 1970, 12 U.S.C.A. §1904 Note (Supp. 1977)." *Id.*

The ESA and EPAA pled and argued by JOHNSON OIL invoked the mandatory and exclusive jurisdiction of TECA and it was TECA and not the Tenth Circuit as to which the JOHNSON OIL appeal on punitive damages should have been directed. The Tenth Circuit properly dismissed the JOHNSON OIL appeal on that score as well as other TECA related issues.

4. *The Holding of the Tenth Circuit Herein is not in Conflict with the Decisions of TECA.*

Little time need be spent in squaring the instant decision with the decisional precedent of TECA, in view of what has already been said. While JOHNSON OIL is heard to argue that the holdings of the TECA Court in *United States v. Cooper*, 482 F.2d 1343 (Em.App. 1973), *Associated General Contractors of America v. Laborers International Union of North America*, 489 F.2d 749 (Em.App. 1973) and *Spinetti v. Atlantic Richfield Company*, 522 F.2d 1401 (Em.App. 1975) are in substantial conflict with the opinion of the Tenth Circuit in the Case at hand, its argument on the subject falls far short of persuasive.

There is nothing remarkable about *Cooper, Associated General Contractors*, and *Spinetti*, they all assert the same axiom of law — that TECA is a court of limited, statutory jurisdiction under the EPAA of 1973, which incorporates section 211 of the ESA of 1970, and that claims or appeals

having no bearing upon or nexus to the ESA or the EPAA are without its jurisdiction. Thus in *Spinetti*, TECA declared that separate antitrust, Fair Trade, and contractual claims, having no foundation under either the Stabilization Act or the Allocation Act, were not properly before it and could only be appealed to the Court of Appeals (in that case the Ninth Circuit).

TECA has been consistently conspicuous in recognizing its restricted judicial field of operation. *Longview Refining Co. v. Shore, et al.*, 554 F.2d 1006 (Em.App. 1977); *Associated General Contractors of America, supra.* While there is nothing novel about the string of TECA decisions proclaiming that the Court will not entertain appeals which are not grounded in the ESA or the Allocation Act, there is, at the same moment, nothing inconsistent with the enunciated doctrine.

It is to state all but the obvious that the decision of the Tenth Circuit in the Case at Bar dismissing the JOHNSON OIL appeal on the question of punitive damages, is not out of step or in conflict with the holdings of TECA. Indeed, whatever else might be said about the Opinion of the Circuit in this Case, the dismissal of the JOHNSON OIL appeal on punitive damages was not only eminently correct, it was in lockstep with the holdings of TECA above-cited.

The Circuit found, with unmitigated cause, that JOHNSON OIL's claim and appeal on punitive damages was grounded in and arose out of the interpretation and construction of the ESA, the Allocation Act, and administrative regulations thereunder. In point of fact, the principal targets

of the JOHNSON OIL appeal, on exemplary damages, was the alleged violation by MOUNTAIN FUEL of the ESA and the Allocation Act. The Tenth Circuit could not have entered upon an examination of the evidence or the law which JOHNSON OIL claimed for its punitive damage appeal without running headlong into the judicial interpretation and construction of the ESA, the EPAA, and the regulations. Accordingly, it is not too much to say that the holding of the Tenth Circuit on this issue is entirely consistent with the rationale of the TECA precedent cited.

This is not to say that the creation of TECA and the specific parameters of its jurisdiction *vis-a-vis* the general jurisdiction of the Court of Appeals, may not present considerable procedural problems for a litigant in a given case. The prospects of bifurcated jurisdiction between TECA and the Court of Appeals in a multi-claim case or whether or not a claim presents a TECA question, is not always the subject of quick or simple determination. But it is to say that under the facts of this Case, the ruling of the Tenth Circuit in the punitive damage appeal of JOHNSON OIL was squarely on the mark and completely comports with the decisions of TECA on the same subject.

POINT III

THE HOLDING OF THE TENTH CIRCUIT IN THE INSTANT CASE IS PLAINLY DISTINGUISHED FROM THE DECISION OF THIS COURT IN BRAY V. UNITED STATES

JOHNSON OIL, at page 21 of its Brief, attempts to suggest that the decision of the Tenth Circuit in the instant litigation is at odds with the *per curiam* opinion of the Supreme Court in *Bray v. United States*, 423 U.S. 73, 46 L.Ed. 2d 215, 96 S.Ct. 307 (1975). Such suggestion is wrong and for the wrong reasons. In *Bray*, the defendant was cited for criminal contempt under 18 U.S.C. §401 for failure to produce records in connection with an investigation of possible violations of the ESA. This Court held that the contempt citation did not arise under the ESA of 1970 but rather under the Criminal Contempt Statute, 18 U.S.C. §401 and ergo, the case was properly within the general appellate jurisdiction of the Tenth Circuit.

The facts in *Bray* are a far cry from those facing JOHNSON OIL in this Case. The punitive damage appeal of JOHNSON OIL is firmly grounded in claimed violations by MOUNTAIN FUEL of both the ESA and the EPAA and only that Court (namely TECA) which maintains jurisdiction to interpolate and construe the crude oil statutes and regulations could pass upon and ascertain whether such claimed violations had in fact occurred and could sustain a claim for punitive damages.

The decision of this Court in *Bray* is distinguished on its facts from the facts of the instant Case. Moreover, the holding of the Tenth Circuit on the JOHNSON OIL appeal on punitive damages is in full conformity with the opinion in *Bray*. Indeed, the Tenth Circuit cites *Bray* at length in support of its ruling. See 586 F.2d at 1383.

The argument of JOHNSON OIL with respect to the *Bray* Case is bankrupt.

POINT IV

THIS COURT SHOULD NOT, AND IN LAW, IS UNABLE TO INVENT TRANSFER JURISDICTION FROM THE CIRCUIT COURT TO TECA OR VICE VERSA

JOHNSON OIL argues in Point II of its Petition for Certiorari that this Court should decree a method in which appeals, which are improvidently filed in the Tenth Circuit, could be transferred to TECA for adjudication. JOHNSON OIL in the same breath also urges the flip side of the proposition, viz., that this Court should judicially provide for transfer jurisdiction for appeals improvidently filed with TECA to an appropriate Circuit.

The short answer to the position of JOHNSON OIL is that this Court is not engaged in the business of inventing and restructuring new jurisdiction for either Courts of Appeal or TECA. It is an axiomatic canon that the Courts of Appeal and TECA are Article III Section 1 tribunals under the United States Constitution and that the Congress is the only entity with power to establish or modify the core, reach, or field of jurisdiction of such appellate courts. The appellate review jurisdiction of the Courts of Appeal are prescribed by the Congress under 28 U.S.C. §2101, *et seq.*, while TECA jurisdiction is set forth in section 211 of the Economic Stabilization Act incorporated into 15 U.S.C. §754 of the Emergency Petroleum Allocation Act.

This Court could not provide for transfer jurisdiction from a Circuit to TECA or back, any more than it could legislate a ruling allowing for transfer from one circuit to another,

in the event that a litigant had mistakenly filed his appeal in the event that a litigant had mistakenly filed his appeal in the wrong court of appeals. *Owen Equipment and Erection Company v. Kroger*, ... U.S. ....., 57 L.Ed. 2d 274, 98 S.Ct. 2396 (1978).

JOHNSON OIL cites no authority whatsoever that would begin to permit this Court to enter the legislative arena and reconstruct the appellate review jurisdiction of the Courts of Appeal or TECA. Its argument is without merit and should be denied.

POINT V

IF THIS COURT WERE TO GRANT THE PETITION FOR CERTIORARI OF JOHNSON OIL HEREIN, THE WRIT SHOULD ISSUE AS TO ALL FACETS OF THE CASE, INCLUDING THE QUESTIONS RAISED BY MOUNTAIN FUEL IN ITS CROSS-APPEAL BEFORE THE TENTH CIRCUIT

It is plain enough that the Petition for Certiorari of JOHNSON OIL in this matter is not well taken for a variety of reasons and should be denied. If, notwithstanding the arguments submitted in this Opposition Brief, this Court determines that Certiorari should be granted, the Writ to be issued to the Tenth Circuit should be directed to the entire case, and all facets thereof, inclusive of the Cross-Appeal of MOUNTAIN FUEL on the issue of breach of contract.

If any party in the instant litigation had provocation to urge that the Tenth Circuit erroneously dismissed its appeal, it is MOUNTAIN FUEL and not JOHNSON OIL. MOUN-

TAIN FUEL raised by way of its Cross-Appeal the common law question of whether it breached its contract with JOHNSON OIL by terminating further sales of crude oil by reason of JOHNSON OIL's failure tc pay for previous sales. The evidence that was permitted by the trial Court regarding the alleged breach of contract on the part of MOUNTAIN FUEL was erroneous in several parts and the testimony on damages was speculative, without foundation, and inadmissible. Thus, the alternative position of MOUNTAIN FUEL is that the breach of contract issue, particularly in light of the contradictory rulings of the trial Court, involved non-TECA questions and should, in all events have been heard by the Tenth Circuit.

MOUNTAIN FUEL does not propose that this Court scrub the arguments advanced herein and somehow grant the Petition for Certiorari of JOHNSON OIL. It does respectfully submit, however, that if Certiorari is permitted, the breach of contract issue under the MOUNTAIN FUEL Cross-Appeal is such an integral part of the punitive damage issue of JOHNSON OIL, that the MOUNTAIN FUEL Cross-Appeal should be, as well, brought before the Supreme Court for review.

CONCLUSION

The Petition of JOHNSON OIL for Certiorari is insipid and unfounded. It does not reach the requirements of Rule 19 with respect to a provident grant of Certiorari, for the decision of the Tenth Circuit does not do violence to any holding of the Supreme Court and it is not in conflict with any case precedent of the TECA Court. The JOHNSON OIL appeal of the Tenth Circuit on the issue of punitive damages

was ladened with issues under and requiring the interpretation of the ESA of 1970 and the EPAA of 1973, by TECA. The JOHNSON OIL appeal in the Tenth Circuit on punitive damages was properly dismissed.

JOHNSON OIL has no standing to bring the instant Petition for Certiorari before this Court. It accepted in full satisfaction of the final Judgment the tender by MOUNTAIN FUEL in payment of that Judgment. It may not accept the fruits of the Judgment in one hand and instantaneously contest or appeal that Judgment with the other hand.

The Petition of JOHNSON OIL should be, by this Court, denied.

Respectfully submitted,

ROBERT S. CAMPBELL, JR.

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Salt Lake City, Utah 84101

Attorney for Mountain Fuel Supply Company, Respondent

April 16, 1979

that there was no evidence to support the claim of business interference although the verdict was not modified to so reflect. (R. 314-15.)

Pursuant to the stipulation of counsel prior to the trial, the issue of JOHNSON's entitlement to statutory overcharges, civil penalties, attorney's fees and costs were reserved for post-trial determination by the Court. By Order dated December 23, 1976, it was held that JOHNSON could not recover any such overcharges, penalties or fees. (R. 321-26.)

14. Entry of Judgment.

Upon the resolution of all outstanding issues, a Final Judgment and Order on Particular Issues and Judgment of Verdict of Jury was entered by the trial Court on May 2, 1977. (R. 327-29.)

JURISDICTION

The Court has, on its own motion, raised the issue of whether it properly has jurisdiction over the subject matter of this appeal or whether the matter should be submitted to the Temporary Emergency Court of Appeals (hereinafter "T.E.C.A."). It is the position of MOUNTAIN FUEL that this Court has jurisdiction to hear and adjudicate each of the claims of the respective parties in that this is not a case which "arises under" the Allocation Act of 1973, insofar as that term has been generally defined. Further, MOUNTAIN FUEL asserts that this Court retains, in all events, jurisdiction over those issues not directly related to the Allocation Act or the regulations promulgated thereunder.

1. To come within the exclusive jurisdiction of T.E.C.A. the case must "arise under" the Allocation Act.

It is recognized, at the outset, that § 211 of the ESA (as incorporated into the Allocation Act) affirmatively provides:

> "[T]he Temporary Emergency Court of Appeals shall have the exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." 12 U.S.C. § 1904 Note (emphasis added).

While the statute would seem to be clear on its face, it has proven difficult in application. But at the very least, under its own terms, § 211 is operative only as to those matters that "arise under" the Acts.

The meaning of the term "arise under," although specifically addressed in other contexts, has seldom been reviewed in the context of the 1970 and 1973 Acts. Indeed, in only one instance has a United States Court of Appeals attempted to interpret the meaning of "arise under" as specifically used in the 1970 Act. In St. Mary's Hospital of East St. Louis, Inc. v. Ogilvie, 496 F.2d 1324 (7th Cir. 1974), the Seventh Circuit, after first citing §211 of the 1970 Act, enunciated the test for determining when an action "arises under" the Act:

> "We interpret the phrase "arising under" as requiring that the allegations of the complaint, not merely the answer, call for the application of the Economic Stabilization Act to the suit. In the absence of such triggering allegations in the complaint, the court of appeals has jurisdiction over the appeal." 496 F.2d at 1326 (emphasis added).

In determining the meaning of the phrase "arise under," the Seventh Circuit noted that the test espoused by it was little

more than the test traditionally employed for determining the existence of federal jurisdiction. The statute which gives rise to federal jurisdiction, 28 U.S.C. §1331(a), specifically requires that an action "arise under" the Constitution, laws or treaties of the United States. Further, it is a well-settled rule of law that in determining whether an action falls within the limits of § 1331 so as to confer jurisdiction, a Federal Court may look only to the complaint for the requisite allegations.

The question, not surprisingly, comes up most frequently in cases where there has been removal from a State to a Federal Court. In the leading case of Pan American Petroleum Corporation v. Superior Court, 366 U.S. 656 (1961), the United States Supreme Court, in a unanimous decision, enunciated the rules for determining when subject matter jurisdiction obtains in the Federal Court. Therein, the Court, speaking through Mr. Justice Frankfurter, observed:

> "It is settled doctrine that a case is not cognizable in a federal trial court, in the absence of diversity of citizenship, unless it appears from the face of the complaint that determination of the suit depends upon a question of federal law." 366 U.S. at 663 (emphasis added).

The Court then declared, citing from its decision in Gully v. First National Bank, 299 U.S. 109 (1936):

> "Apart from diversity jurisdiction, 'a right or immunity created by the Constitution or laws of the United States must be an element, an essential one, of the plaintiff's cause of action . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . .'" Id. (emphasis added).

And further, the Court, in Pan American, noted:

> "For this requirement it is no substitute that the defendant is almost certain to raise a federal defense." Id.

Since Pan American, as does the case at hand, involved an issue of exclusive jurisdiction, the Court was compelled to note that "exclusive jurisdiction" under the federal act applied only to those suits which could be brought in Federal Court in all events. As it was the ruling of the Supreme Court that federal jurisdiction did not appear upon the face of the complaint, the Court found the statutory grant of exclusive jurisdiction wholly inapplicable. 366 U.S. at 664.

That the Tenth Circuit has consistently followed the so-called "well-pleaded complaint" rule in federal-question cases and thus should apply the same test to determine jurisdiction under the 1970 and 1973 Acts herein, cannot be disputed. One of this Court's most recent pronouncements of the rule is found in Mescalero Apache Tribe v. Martinez, 519 F.2d 479 (10th Cir. 1975). In that case, this Court, in holding that jurisdiction was not providently laid under 28 U.S.C. § 1331, said:

> "It has been suggested that the proper test under § 1331 for finding original federal jurisdiction is that there be a 'substantial claim founded directly upon federal law.' In deciding whether the matter in controversy involves such a claim, only the complaint should be examined, and, indeed, only those parts of the complaint directly and necessarily relating to the plaintiff's cause of action should be considered." Id. at 481 (emphasis added).

See also, North Davis Bank v. First National Bank of Layton, 457 F.2d 820 (10th Cir. 1972) and Chandler v. O'Bryan, 445 F.2d 1045

(10th Cir. 1971). See, in addition, Rath Packing Co. v Becker, 530 F.2d 1295 (9th Cir. 1975), wherein the Ninth Circuit recently held that a federal issue raised in a counterclaim was also not sufficient to bestow jurisdiction on a Federal Court.

The case at bar, under the undisputed facts, falls squarely within the parameters of the "well-pleaded complaint rule" of St. Mary's and Mescalero. The record before the Court indicates that MOUNTAIN FUEL originally instigated this action in one of the District Courts for the State of Utah. The original, and only, Complaint filed by MOUNTAIN FUEL, in the State District Court for Utah, did not, in any sense, involve itself with or raise substantive issues concerning either the 1970 or 1973 Acts or any regulations promulgated thereunder. (R. 4-7.) Indeed, the Complaint alleges a cause of action sounding solely in breach of contract. Paragraph 4 of the Complaint reads:

> "4. That on or about the 15th day of July, 1970, the parties entered into a written agreement, a copy of which is attached hereto, referred to hereby and incorporated herein." (R. 4.)

While it is true that Paragraphs 6 and 7 of the Complaint (R. 5) allude to "Phase IV" oil regulations promulgated by the CLC, such does not change the essence or character of the Complaint. The said regulations are neither attacked nor sought to be enforced. Nowhere on the face of the Complaint does MOUNTAIN FUEL ask for an interpretation or application of the regulations.

It is equally clear from the record that the issues involving the 1970 and 1973 Acts were specifically raised by the

Defendant, essentially in the nature of a defense, in the Answer and Counterclaim. (R. 20-23.) Thus it is that under the prevailing and dispositive case law, the action on appeal herein did not, and does not, "arise under" the ESA or the Allocation Act, as is required by the operative provisions of §211 of the 1970 Act.

It should further be noted that the cases cited by letter of counsel for the Clerk of the Court dated September 13, 1977, are not controlling in the instant case. Each of the cases deals with a situation wherein the issues involving the Allocation Act were expressly raised and confronted by the initial complaint of the plaintiff. See, for example, Withington v. F.E.A. and Frank Zarb, No. 76-1612 (10th Cir. August 25, 1976).

2. Even were it assumed for the sheer sake of argument that T.E.C.A. does have jurisdiction, the same is limited strictly to those issues which deal directly and substantively with the 1970 and 1973 Acts.

Since T.E.C.A. is a Court of special jurisdiction, it has been held numerous times that the exercise of jurisdiction by T.E.C.A. must be strictly construed and narrowly defined. In the case of Spinetti v. Atlantic Richfield Company, 522 F.2d 1401 (Em. App. 1975), T.E.C.A., itself, held that it had jurisdiction to hear only those issues dealing directly with the validity, interpretation or application of the Acts or their regulations. In Spinetti, the Plaintiff brought an action in Federal Court alleging, in separate counts, antitrust, fair trade and contractual violations. In addition, the plaintiff alleged that the conduct of the defendant violated certain of the regulations issued pursuant to the Allocation Act. On appeal, T.E.C.A. held that

while it did have jurisdiction over that count of the complaint alleging violations of the Allocation Act, it did not have jurisdiction over the remaining counts since the same did not arise under the Act. Said the Court:

> "The antitrust, Fair Trade and contractual claims are appealable only to the Ninth Circuit Court of Appeals . . . . As stated in United States v. Cooper, 482 F.2d 1393, 1398 (Em. App. 1973: '[C]ourts of special jurisdiction should strictly construe their statutory grants of jurisdiction.'" Id. at 1403.

The Spinetti decision is persuasive in the instant case for two reasons. First, it is support for the application of the "well-pleaded complaint" rule discussed hereinabove. It is clear that in Spinetti, T.E.C.A. limited its exercise of jurisdiction only to those issues which, on the face of the complaint, dealt directly with the Allocation Act. Second, it illustrates that T.E.C.A., as a Court of special jurisdiction, has no authority to review "pendant" claims or issues.

3. Conclusion as to Jurisdictional Issue.

This Court has a firm hand on subject matter jurisdiction on each and all of the issues, including "posted price" and "allocation" of Dry Piney crude oil, on appeal herein, whether those issues are raised under the cross-appeal of MOUNTAIN FUEL or the main appeal of JOHNSON. In the unlikely event it is determined that the issues of "posted price" and "allocation" under the 1970 and 1973 Acts are ones of exclusive jurisdiction with T.E.C.A., only those specific issues should be referred to that Court.

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation, Plaintiff, vs. RELAND JOHNSON and JOHNSON OIL COMPANY, Defendants.	:	TENDER OF SATISFACTION OF JUDGMENT Case No. Nc-75-3

COMES NOW the Plaintiff, MOUNTAIN FUEL SUPPLY COMPANY, by and through its counsel of record, ROBERT S. CAMPBELL, JR., and herewith tenders the sum of $47,393.24 in full payment and satisfaction of that certain Judgment entered in the above-styled action on May 2, 1977. The sum has been calculated as follows:

Original judgment	$65,000.00
Less: Amount due to Mountain Fuel Supply for crude oil purchases of Johnson Oil, together with interest at the rate of 6% per annum from the date of each partial payment to the date of judgment.	23,203.99
	$41,796.01
Plus interest at the rate of 8% per annum on the balance from May 2, 1977, the date of judgment, to January 3, 1979.	5,597.23
Total Judgment	$47,393.24

Said sum is also exclusive of costs, which were awarded to the Defendant as a part of the Final Judgment but which have not, as yet, been taxed by the Clerk of the Court.

DATED this 3rd day of January, 1979.

ROBERT S. CAMPBELL, JR.
of and for
WATKISS & CAMPBELL
310 South Main Street, 12th Floor
Salt Lake City, Utah 84101

Attorneys for Plaintiff
Mountain Fuel Supply Company

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation, Plaintiff, vs. RELAND JOHNSON and JOHNSON OIL COMPANY, Defendants.	:	ORDER WITHOUT PREJUDICE Case No. NC-75-3

The Motion of the Defendant, JOHNSON OIL COMPANY, permitting it to withdraw and accept the Tender of Satisfaction of Judgment of Plaintiff with reservation to pursue an appeal or any other portion of its Counterclaim having come on for hearing before this Court, the Honorable ALDON J. ANDERSON, Chief United States District Judge presiding, on Thursday, the 18th day of January, 1979, Plaintiff being represented by its counsel ROBERT S. CAMPBELL, JR., ESQ. of WATKISS & CAMPBELL and the Defendant being represented by its counsel JOSEPH C. RUST of KIRTON & MC CONKIE, and the Court having heard argument in connection with Plaintiff's Motion and being advised in the premises,

NOW THEREFORE, good cause appearing, IT IS HEREBY ORDERED that the proceedings in this case have been and are before Senior U. S. District Judge WILLIAM G. JUERGENS, that it is procedurally appropriate that Plaintiff's Motion be brought before Judge Juergens for review and disposition and this Court defers to Judge Juergens in the matter;

IT IS FURTHER ORDERED that the Motion of the Defendant, JOHNSON OIL COMPANY, be and the same is hereby denied without prejudice to bring the matter before Judge Juergens for review and determination.

DATED this 19 day of January, 1979.

BY ORDER OF THE COURT

ALDON J. ANDERSON
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

* * * * * * * *

MOUNTAIN FUEL SUPPLY COMPANY, a Utah corporation,

Plaintiff,

vs.

RELAND JOHNSON and JOHNSON OIL COMPANY,

Defendants.

ACCEPTANCE OF TENDER OF SATISFACTION OF JUDGMENT

Case No. Nc-75-3

* * * * * *

Defendants Johnson Oil Company and Reland Johnson accept plaintiff's tender of satisfaction of judgment to the extent as the same is described in plaintiff's Tender of Satisfaction of Judgment on file with the Court herein and with the explicit understanding that defendants did not receive deliveries of oil from Mountain Fuel between the date of the jury verdict of June 23, 1976 and November of 1976 when deliveries of oil were resumed, and that plaintiff's Tender of Satisfaction of Judgment does not resolve or satisfy defendants' claim to those deliveries, and with the further understanding that this acceptance is not meant in any way to limit defendants' right of appeal on any portion of its counterclaim.

Dated this 5th day of February,1979.

KIRTON & McCONKIE

JOSEPH C. RUST
KIRTON & McCONKIE
Attorneys for Defendants
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978 No.78-1431

JOHNSON OIL COMPANY, INC.

Petitioner,

vs.

MOUNTAIN FUEL SUPPLY COMPANY,

Respondent.

REPLY BRIEF

DAN S. BUSHNELL
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978 No.78-1431

JOHNSON OIL COMPANY, INC.	:	
Petitioner,	:	REPLY BRIEF
vs.	:	
MOUNTAIN FUEL SUPPLY COMPANY,	:	
Respondent.	:	

DAN S. BUSHNELL
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I N D E X

Table of Cases

Other Authorities

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978 No. 78-1431

JOHNSON OIL COMPANY, INC.

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MOUNTAIN FUEL SUPPLY COMPANY,

Respondent.

REPLY BRIEF

The petitioner Johnson Oil Company, Inc. respectfully submits this Reply Brief pursuant to Rule 24(4) of the Rules of Practice of this Honorable Court in response to that portion of the opposition brief of respondent Mountain Fuel Supply Company which raised matters not presented by the Petition for Writ of Certiorari. Specifically, this brief is in response to Point I of respondent's brief alleging that Johnson Oil does not have standing to

petition. Although petitioner does have a response to the arguments raised by respondent in its opposition brief to the points raised in the original Petition for Certiorari, those arguments will not be discussed here in keeping with the said Supreme Court Rule 24(4).

POINT I

THE CERTIORARI PETITION OF JOHNSON OIL SHOULD NOT BE DENIED ON GROUNDS THAT BY ACCEPTING PAYMENT OF THE COMPENSATORY DAMAGE CLAIM, PETITIONER WAIVED ANY RIGHT TO PETITION THIS COURT FOR CERTIORARI REVIEW

1. Petitioner Johnson Oil does have standing to petition for certiorari under the Hougham Rule.

Respondent argues that all justiciable issues of controversy have been put to rest by the petitioner's acceptance of the compensatory damage award and that the acceptance stripped Johnson Oil of the standing necessary to petition this Court for certiorari. In so arguing, respondent carefully sidesteps the rule of law

clearly enunciated by this Court in United States v. Hougham, 364 U.S. 310, 81 S.Ct. 13, 5 L.Ed.2d 8 (1960). In that case the Court held that:

> [i]t is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim.

Respondent seeks to limit the impact of the Hougham Rule by restricting its application to the unique facts of that case. In Hougham the judgment debtor argued that the payment was offered and accepted as an accord and satisfaction. However, at the Court of Appeals he had sought to avoid all liability even though the payment had already been accepted. This unique feature of the Hougham case does not render it inapposite to the case at bar. Justice Black characterized these

unique facts as illustrative of "the good sense underlying [the] rule." Id., 364 U.S. at 312. Obviously the rule was intended to have broader application than to just the fact of that one case.

It is argued that the general rule of law is that the right to accept the fruits of a judgment is inconsistent with the right to appeal therefrom. However, this general rule is subject to the limitation that an appeal will not be barred where a reversal of the judgment

> cannot affect the right of the party fo the benefit which he has secured thereby; as, for example, where there is no controversy as to his right for the amount for which the judgment was given, but he claims that he was entitled to a greater amount.

San Bernadino County v. Riverside County, 135 Cal. 618, 67 P. 1047 (1902). This analysis is consistent with what this Court outlined in Embry v. Palmer, 107

U.S. 3, 2 S.Ct. 25, 27 L.Ed. 346 (1883). In that case the appeal was allowed because "the amount awarded, paid and accepted constitutes no part of what is in controversy." Id. 107 U.S. at 8. Therefore, a key element in determining whether the judgment is severable or divisible is to first determine what is in contr[illegible]y on the appeal. If the appeal cannot [illegible]t a decision already made, then t[illegible]al should be allowed.

T[illegible] the same analysis this Court followe[illegible] Hougham. At the Supreme Court level in that case the amount the respondent had already paid was no longer in dispute. Any decision of the Court in that case could not affect what was already paid. The same situation exists in the present case. The question raised on this appeal is whether the trial court erred in setting aside the punitive damage

award. The compensatory damage award which Mountain Fuel tendered is simply no longer a matter of controversy. A decision by this Court on the issue raised cannot affect the payment already accepted. Therefore, the exemplary damage claim is separable and divisible from the compensatory claim and this case comes under the first exception outlined by Respondent. Brief for Respondent at 14. See also Luther v. United States, 225 F.2d 495 (10th Cir. 1955); Carson Lumber Co. v. Saint Louis & San Francisco Railroad Co., 209 F. 191 (8th Cir., 1913). Respondent's reliance on Maw v. Weber Basin Water Conservancy District, 20 Utah 2d 195, 436 P.2d 230 (1968) misses the crucial issue of what is a controversy on the appeal. It is not a question of whether the punitive damages could have been awarded without the compensatory. Rather it is a

question of whether an acceptance of compensatory damages precludes an appeal on the punitive damages. Since there is a separate controversy on appeal as to the latter, these two types of damages are clearly severable.

2. There was no manifestation of intent on the part of Johnson Oil to support an inference that by accepting the payment, Johnson Oil acknowledged an accord and satisfaction.

Respondent relies heavily on the fact that the $47,393.24 was expressly tendered by Mountain Fuel in "full payment and satisfaction" of the judgment and that by accepting payment Johnson Oil acknowledged an accord and satisfaction of the judgment. Respondent admits that Johnson Oil did not intend to acknowledge the payment as an accord and satisfaction. Brief for Respondent at 16. Instead Johnson Oil clearly stipulated that the acceptance was not meant to limit Johnson Oil's right of

appeal on any portion of its counterclaim. Brief for Respondent, Appendix 4. The fact that Johnson Oil, prior to accepting payment, filed a Motion before the District Court to permit acceptance without prejudicing any appeal also indicates that Johnson Oil never intended the acceptance to be viewed as an acknowledgment of an accord and satisfaction.

Johnson Oil's manifestation of intent is a critical issue in the resolution of this problem according to case law. In Gadsden v. Fripp, 330 F.2d 545 (4th Cir. 1964), the Fourth Circuit held that the mutual intent of both parties to bring the case to a definitive conclusion is determinative where there has been a payment of a judgment. The court said:

> A payment of a judgment is not necessarily a bar to appeal. When a payment of a judgment is made and accepted under such circumstances as to indicate an intention to finally compromise

> and settle a disputed claim, an appeal may be foreclosed, but under such circumstances, it is the mutual manifestation of an intention to bring the litigation to a definite conclusion upon a basis acceptable to all parties which bars a subsequent appeal, not the bare fact of payment of the judgment. (Emphasis added.) (Footnotes ommitted.)

Id. at 548.

Respondent concedes that in the present case there was no mutual manifestation of intent to bring a definite conclusion to the litigation. Johnson Oil clearly stipulated the acceptance of the award was not intended to bring the litigation to a conclusion. The above rule has been characterized by one treatise writer as "sound" as an adherence to "elementary and familiar principles." See, Moores Federal Practice, Vol. 9 § 203.06 at p.719.

Conclusion on Standing

Johnson Oil has standing to petition this Court for Certiorari. The facts of this case fit squarely under the general rule enunciated by this Court in Hougham. The judgment is separable in that any decision of this Court cannot affect the amount paid. In addition, petitioner Johnson Oil has carefully maintained its right to appeal by expressly stipulating that it was not its intention to forego its right to appeal. Therefore, petitioner respectfully requests this Court to grant its Petition for Writ of Certiorari.

Joseph C. Rust

AFFIDAVIT OF SERVICE

I, Kathy Pickett, depose and say that I am a secretary in the office of Dan S. Bushnell and Joseph C. Rust, and that on May 8, 1979 pursuant to Rule 33, Rule of Supreme Court, I served three copies by mail of the foregoing Reply Brief on each of the parties required to be served herein, as follows:

Robert S. Campbell
Duane R. Smith
Watkiss & Campbell
310 South Main #1200
Salt Lake City, Utah 84101

Kathy Pickett